Office-Supreme Court, U.S.
FILED
FEB 7 1963
JOHN F. DAVIS, CLERK

No. 803

IN THE

Supreme Court of the United States

October Term, 1962

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, an agricultural improvement district,

Appellant,

v.

THE CITY OF MESA, a municipal corporation,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

JURISDICTIONAL STATEMENT

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Appellant,

v.

THE CITY OF MESA, a municipal corporation,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the Supreme Court of Arizona denying a rehearing as to the court's original decision affirming in part and reversing in part a judgment in appellant's favor rendered by the Superior Court of Maricopa County and holding that under Arizona Constitution, Article XIII, § 7 and Arizona Revised Statutes Annotated § 9-522 A(1) (1956) appellee has the power to condemn appellant's properties and facilities. The effect of the judgment appealed from is to sustain, contrary to appellant's contentions, the federal constitutionality of those provisions, as construed by the Supreme Court of Arizona.

Opinions Below

The opinion of the Arizona Supreme Court is reported at 92 Ariz. 91, 373 P. 2d 722 (1962), and is reprinted as Appendix A. Rehearing was denied without opinion. The Superior Court's decision is not reported and is reprinted as Appendix B. The judgment appealed from and the order denying rehearing are reprinted as Appendix C.

Jurisdiction

The original decision of the Arizona Supreme Court was rendered July 5, 1962. Rehearing was denied on September 20, 1962 and judgment was entered on September 27, 1962. On December 13, 1962 Notice of Appeal to this Court was duly filed with the Arizona Supreme Court.

Jurisdiction is based on 28 U. S. C. § 1257(2) (1958); *Morey* v. *Doud*, 354 U. S. 457 (1957); *Young* v. *Ragen*, 337 U. S. 235 (1949); *Township of Hillsborough* v. *Cromwell*, 326 U. S. 620 (1946); *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194 (1934); and *Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, 281 U. S. 313 (1930).

Statutes Involved

Arizona Constitution, Article XIII, § 7 provides:

> "*Irrigation and other districts as political subdivisions*
>
> "Irrigation, power, electrical, agricultural improvement, drainage, and flood control districts, and tax levying public improvement districts, now or hereafter organized pursuant to law, shall be political subdivisions of the State, and vested with all the rights, privileges and benefits, and entitled to the immunities and exemptions granted municipalities and political subdivisions under this Constitution or any law of the State or of the United States; but all such districts shall be exempt from the provisions of sections 7 and 8 of Article IX of this Constitution."

Arizona Revised Statutes Annotated § 9-522 A(1) (1956), provides in material part:

> "*Power to issue bonds*
>
> "A. In addition to its other powers, a municipality may:
>
> "1. Subject to the requirements and restrictions of §§ 9-515 through 9-518, within or without its corporate limits, construct, improve, reconstruct, extend, operate, maintain and acquire, by gift, purchase or the exercise of the right of eminent domain, a utility undertaking or part thereof, and acquire in like manner land, rights in land or water rights in connection therewith."

Section 9-522 is reprinted in full as Appendix D.

Question Presented

Whether Arizona Constitution, Article XIII, § 7 and Arizona Revised Statutes Annotated § 9-522 A(1) (1956), as construed by the Arizona Supreme Court, violate the Fourteenth Amendment by depriving the appellant agricultural improvement and power district of the equal protection of the laws by vesting in the City of Mesa—a state municipality—the right to take by condemnation appellant's electrical power transmission facilities maintained and operated as a part of the Salt River Project—a federal reclamation project—in order to supply the City with electrical energy for sale by the City to users now being served by the appellant district.

Statement of the Case

Proceedings Below

Suit was commenced in the Superior Court of Arizona by appellee ("the City") against appellant ("the District") to determine the District's right to continue to serve electric energy to users within the City's corporate

limits and adjacent areas and to use City streets and other public ways for that purpose (R. 38-43).* The District counterclaimed to restrain the City from interfering with the District's electric service (R. 54-64).

The Superior Court decided all issues adversely to the City. On appeal the Arizona Supreme Court held, among other things, that under the state constitutional and statutory provisions involved the City may acquire the District's electrical facilities by eminent domain (pp. 13a-16a).

Petitioning for rehearing, the District urged that, as construed by the Supreme Court, these provisions violate the Fourteenth Amendment by depriving the District of the equal protection of the laws (Petition, p. 2, Brief, pp. 14-20). Rehearing was denied without opinion (p. 37a).

The Decision Below

The Arizona Supreme Court held that: (1) the District "is a municipal corporation of a peculiar type," i.e., "essentially a business corporation with attributes of sovereignty which are only incidental" (p. 13a); (2) the City has the sovereign right of eminent domain (p. 14a); and (3) although the District's property is appropriated to a public use, the City may condemn the property "if it appears that the public use to which it is to be applied is a more necessary public use" (p. 14a).

In so holding, the court ignored the *federal* public use of the District's property and the fact that the District is an agent of the United States in transmitting electric energy generated by the Salt River Project to lands within the boundaries of the Project and the District. Since the use

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* References to pages of the abstract of record filed with the Supreme Court of Arizona and certified to this Court are indicated by "(R. ..)". References to the appendices to this Jurisdictional Statement are indicated by "(p. ..a)."

of the District's electrical energy facilities is a federal use, it is a public use coequal with, and indeed superior to, the proposed use by the City. Therefore, the Arizona Supreme Court erred as to the sole foundation for its holding that the City may condemn the District's facilities, namely, that the City's proposed use is a "higher" use than that of the District. The reverse is true.

By thus subordinating the District's federal use to the City's proposed municipal use, the court construed the Arizona constitutional and statutory provisions involved so as to deny the District equal protection of the laws.

The Arizona court's decision also establishes, in this case of first impression, a precedent which, if undisturbed and followed, would subject the property of irrigation and power districts serving the purposes of federal reclamation projects to forcible taking in condemnation by local municipalities throughout the land.

The Operative Facts

Formation of the Association in 1903

The Salt River Valley Water Users' Association (the "Association"), was incorporated in 1903 as a private corporation to furnish irrigation, electric power and drainage for lands of its members (p. 2a). The City, then known as the Town of Mesa, was excluded from the boundaries of the Association (p. 2a). The Association was authorized to contract with the United States for the construction and operation of dams, power plants, transmission lines and other facilities incident to the storage, production, distribution and operation of water and electric power facilities for the benefit of the lands of its members, which were identical with the lands within the exterior limits of the Salt River Project established by the Secretary of the Interior under the Reclamation Act. 32 Stat. 388 (1902), as amended, 43 U. S. C. §§ 371-573 (1958).

The Association's 1904 Contract With the United States

Accordingly, the Association made a contract with the United States (acting by the Secretary of the Interior) dated June 25, 1904, whereby it undertook, "as agent for the United States," to collect from its members and to remit to the United States payments on account of the cost of construction and operation of the works built and run by the United States as part of the Salt River Project (pp. 39a-45a). The Association also guaranteed payment of the amounts due from its members to the United States (pp. 42a-43a). To enforce these collections, the Association agreed to adopt appropriate by-laws, subject to the Secretary's approval and unalterable without his consent (p. 43a). The rights of Association members were to be determined under the Reclamation Act, Arizona laws not inconsistent therewith, and the Secretary's administrative regulations (p. 44a).

The Association's 1917 Contract With the United States

On September 6, 1917 the Association made a supplementary contract with the United States whereby the latter turned over to the Association "as agent for the United States" operation and maintenance of the Salt River Project and all property used in connection with it, including power plants, power houses, and power transmission lines, as well as electric power and power privileges, with the right of possession necessary or convenient for operation and maintenance of the Project (pp. 47a-57a).

The Association was given the right to all revenue, including that from electrical power, derived from the Project (p. 49a). The Association, in turn, agreed at its expense to maintain the efficiency of the Project and not to make substantial changes in existing works without the written consent of the Secretary of the Interior, although it was free to build additional works at its own expense

without secretarial assent if they did not diminish Project efficiency (pp. 49a-50a).

The Association agreed to repay the United States the entire cost of the Project, computed at over $10,000,000 due as of January 1, 1917, plus any additional sums expended by the United States from then until the Association took over operation and maintenance of the Project (p. 50a).

The Association's contracts to sell or lease power or power privileges for more than one year were subject to the Secretary's approval (p. 54a).

The United States was given the right to inspect the Association's books (p. 55a). There were to be periodic inspections of the Project by the Secretary at Association expense to check performance of the agreement (p. 52a), which was cancelable if the Association failed to carry it out, or if the Secretary believed that the security of the United States for payment of the Project's construction cost was being impaired by the Association's failure properly to maintain the Project (p. 53a). Upon such termination, the Secretary was given the right to exercise all powers regarding the Project vested in him by law. The Secretary reserved the right to adopt regulations to carry out the intent of the Reclamation Law and the agreement (p. 55a).

The Association's 1937 Contract With the District

The District was organized to provide irrigation and electric power to lands within the Project. By agreement dated March 22, 1937, the Association transferred all its properties, including water and power rights and revenues, to the District (pp. 58a-73a).

The agreement referred to the properties comprising the Salt River Project as "vested in the United States" under the Reclamation Act (p. 60a). The total amount

expended for construction of the Project by the United States and the Association, including power plants, power distribution and communication lines, and other properties, "all of which," the agreement recited, "are owned by the United States," was fixed at over $36,700,000, of which more than $22,000,000, represented by various bond issues of the Association, was then unpaid (pp. 60a-61a). The agreement declared that "all of the works described . . . are necessary and useful for the proper irrigation of, and the supply of power and drainage to, the lands included within the boundaries of the District . . ." (p. 62a).

Significantly, the agreement noted that when the Association was incorporated as a private corporation in 1903, the Territory of Arizona had no laws providing for incorporation of agricultural improvement and power districts as public corporations or political subdivisions of the Territory, having rights of perpetual succession, eminent domain, taxation and tax exemption and that Arizona statutes, first enacted in 1928, provided that, for the purposes for which the Association had been incorporated, agricultural improvement and power districts might be organized within the state and vested with all these rights and privileges (pp. 62a-63a).

Therefore, the agreement recited, it was necessary that both the Association and the District should continue in existence and remain in authority over the lands of the Association and the District (p. 63a). Accordingly, the Association was to continue to construct, maintain and operate the works of the Salt River Project, and would "sell, lease, or otherwise dispose of surplus water and power as agent for the United States, the owner thereof, in accordance with the . . . contracts between the Association and the United States" and any additional agreements with the United States necessary to accomplish Association purposes or required under the Reclamation Act (pp. 63a-64a). Subject to the rights of the United States under the

Reclamation Act, the Association agreed to turn over to the District "title to lands or interests in lands" owned or held by the Association and the structures thereon used by the Association in carrying out its purposes and its contracts with the United States (p. 65a).

Conversely, the District agreed to hold title to the properties transferred "for the use and benefit of the United States, insofar as the United States may have an interest therein under the Reclamation Act . . ., and subject to disposition of such interest by order of the Secretary of the Interior of the United States". (p. 67a). The District also agreed to assume the indebtedness of the Association, to refinance its payment, and to assess and use the necessary taxes for this purpose; to exercise its power of eminent domain, on written request of the Association, over lands within the District needed for Association and District purposes; and to perform the Association's contracts with the United States (pp. 68a-70a). However, the Association was not to be prevented "from condemning lands for Association purposes in the name of the United States, with the approval of the Secretary of the Interior, when such action shall be, in the opinion of the Association or the Secretary, necessary or desirable" (p. 70a).

The Secretary of the Interior approved the agreement on May 18, 1937 (pp. 72a-73a) on condition "that the District agrees to accept title to the property conveyed subject to any and all provisions of all contracts between the United States and the Association and that the District will faithfully and promptly comply with any order directed to the Association by the United States pursuant to said contracts, and that any remedy available to the United States against the Association by virtue of the contracts mentioned shall be enforceable against the District". (p. 73a).

The agreement could be amended by the Secretary and, with his approval, by the parties.

The Association's 1949 Contract With the District

By an amendatory agreement of September 12, 1949 the operations of the power and irrigation systems of the Salt River Project were separated: operation of the irrigation system was allocated to the Association and operation of the power system to the District (pp. 78a-84a).

The power system was defined as including "all property used in the generation, transmission and distribution of electric power and energy, and all other facilities used solely in connection with the operation and maintenance of said works and property" (p. 80a).

The District assumed all costs of capital additions to and replacements of the works of both the irrigation and power systems of the Project and undertook payment of the Association's indebtedness under its contracts with the United States (pp. 80a-82a).

Effectiveness of the agreement was conditioned upon approval by the Secretary of the Interior (p. 84a), which he gave on October 4, 1949, subject to the same conditions as had limited his approval of the original agreement of March 22, 1937 between the District and the Association (p. 85a).

The Association's Electrical Energy Contracts With the City

On September 18, 1922 Congress by "An Act authorizing the sale of surplus power developed under the Salt River reclamation project, Arizona," 42 Stat. 847, and made a part of the Reclamation Act, 43 U. S. C. § 598 (1958), provided in material part:

> "Whenever a development of power is necessary for the irrigation of lands under the Salt River reclamation project, Arizona, or an opportunity is afforded for the development of power under said

> project, the Secretary of the Interior is authorized, giving preference to municipal purposes, to enter into contracts for a period not exceeding fifty years for the sale of any surplus power so developed, and the money derived from such sales shall be placed to the credit of said project for disposal as provided in the contract between the United States of America and the Salt River Valley Water Users' Association, approved September 6, 1917. *Provided*, that no contract shall be made for the sale of such surplus power which will impair the efficiency of said project: *Provided, however*, that no such contract shall be made without the approval of the legally organized water users' association or irrigation district which has contracted with the United States to repay the cost of said project . . . ."

Pursuant to this statutory authority, in the period 1929-1949, under successive agreements with the City approved by the Secretary of the Interior, the Association sold electrical energy generated by the Salt River Project to the City for resale to users within and without the City's corporate limits (pp. 2a-3a). The City agreed that it would not, without Association consent, generate electric energy nor accept it from any other source until it had received the maximum amount which the Association agreed to furnish.

The Association agreed it would not serve electric energy, except such as might be required for operation of the Salt River Project, within the boundaries of the service territory reserved for the City (p. 22a).

Each agreement provided that the City's transmission lines and installations affecting the Association's connecting electrical equipment should be constructed and installed according to plans, and maintained and operated in a manner acceptable to the Association and the Secretary of the Interior, and that, should any defects in the City's facilities interfere with the Association's electrical equipment, the Association and the Secretary might demand that the defects be remedied, the Association to have the right to cease furnishing energy until the defects were removed.

The last in this series of agreements expired April 30, 1949 and was not renewed (p. 3a).

Expansion of the City's Limits

From 1917 until 1949 the City's incorporated limits covered an area of one square mile. In January 1949 the City began to annex contiguous areas in which the Association was serving electric energy (p. 24a). Despite successive annexations, the Association until September 12, 1949 and the District to date, have supplied electric energy to users in the annexed areas (p. 26a).

The Superior Court made the specific finding of fact, undisturbed by the Arizona Supreme Court, "that adequate utility service is being rendered by the [District] . . . within the boundaries of [the City] . . ." (p. 31a).

The Arizona Power Authority Contract With the City

After expiration of the last electric energy contract between the City and the Association on April 30, 1949, the City made an agreement effective June 1, 1949 to purchase electric energy from the Arizona Power Authority ("the Authority"), a public agency of the State of Arizona (p. 16a). The City's application for a power purchase certificate was supported by a verified statement dated January 28, 1949, reciting that the City was engaged in "the business" of serving electricity to its residents and others in areas contiguous to the City limits; and that, while a small portion of the electric energy it sought would be consumed by the City itself, the major part would be resold to its customers at retail.

The statement disclosed that areas not served by the City within City limits and areas outside those limits which the City desired to serve were being served by the Association; and that the City had notified the Association of

the City's purpose to purchase the Association's distribution system in the areas which the City proposed to serve.

It is this distribution system, now operated by the District, which the City has been given the right to condemn.

The Federal Question Presented Is Novel, Substantial, and Meritorious

The Federal Nature of the District's Public Service

The Association was formed in 1903, soon after passage of the Reclamation Act in 1902, which "outlines a comprehensive reclamation scheme, and provides for . . . construction and maintenance of irrigation works for the storage, diversion, and development of water for the reclamation of arid and semi-arid lands." *Henkel* v. *United States*, 237 U. S. 43, 49 (1915). The Association, and later the District as its successor, became an integral part of this scheme.

The District was organized under the Arizona Revised Statutes, which authorize the formation of an agricultural improvement district by five or more owners of agricultural lands within a United States reclamation project. The District was established (1) to secure water and electric power for the lands, (2) to sell surplus water or power to reduce irrigation cost and (3) to construct, maintain, and finance the necessary works. Arizona Revised Statutes Annotated § 45-903 (1956) (hereafter cited "ARS § ....").

Title to property acquired by the District is held "in trust for, and as dedicated and set apart to, the uses and purposes" of the statute. ARS § 45-937 A. The District is given "a right of way . ... to locate, construct and maintain the works over, through and upon any of the lands which are the property of the state or any subdivision or institu-

tion thereof," ARS § 45-938 C; is legally recognized as "a public, political, taxing subdivision of the state, and a municipal corporation to the extent of the powers and privileges conferred by . . . [the statute] or granted generally to municipal corporations by the constitution and statutes of the state, including immunity of its property and bonds from taxation," ARS § 45-902; and is given the right of eminent domain to take "all land and other property necessary . . . or useful for the purposes of the [D]istrict." ARS § 45-940 B. The "use of the property which is condemned . . . is declared to be a public use . . . ." ARS § 45-939.

The Arizona Constitution constitutes the District a "political subdivision . . . of the State . . . vested with all the rights, privileges and benefits, and entitled to the immunities and exemptions granted municipalities and political subdivisions under this Constitution or any law of the State or of the United States . . . ." Art. 13, § 7.

The District has never had a franchise from the City. It derives its existence and corporate powers from the State of Arizona, as does the City, and both are political subdivisions of the state.

But the District, unlike the City, is engaged in a federal public service. The state statutes just referred to were enacted to enable the District to function as a component of the operative scheme of the Reclamation Act. Thus, the District is given the power of eminent domain so that it may exert that power as agent of the Secretary of the Interior who, under the Reclamation Act, may condemn property needed for purposes of the act. 32 Stat. 389 (1902), 43 U. S. C. § 421 (1958). The District is given power to tax in order that it may function, under appointment by the Secretary, "as the fiscal agent of the United States to collect the annual payments on the construction charge of the [reclamation] project and the annual charges for opera-

tion and maintenance and all penalties . . . ." 38 Stat. 688 (1914), 43 U. S. C. § 477 (1958).

The transfer in 1917 of management and operation of the Project from the United States to the Association (pp. 6-7, *supra*) was authorized by Congress in the Reclamation Act: 42 Stat. 847 (1922), 43 U. S. C. § 598 (1958). The contract between the Association and the District dated March 22, 1937 (pp. 58a-72a) whereby the Association's property was transferred to the District, subject to rights of the United States, was also authorized by Congress in the Reclamation Act. 42 Stat. 541 (1922), 43 U. S. C. § 511 (1958). The successive agreements for the sale of electric energy to the City by the Association (pp. 10-11, *supra*), each of which was approved by the Secretary of the Interior, were made pursuant to special legislation enacted by Congress, 42 Stat. 847 (1922), 43 U. S. C. § 598 (1958), and the revenues derived therefrom are entrusted to the federal reclamation fund established by the Reclamation Act. 34 Stat. 117 (1906), as amended, 43 U. S. C. § 522 (1958).

In short, the applicable statutes, federal and state, and the agreements made pursuant to their authority, demonstrate that the District, in its activities, including the generation, transmission, and sale of electric energy, is engaged as an agency or instrumentality of the United States in the achievement of a national purpose and in the rendition of a federal public service—the maintenance and operation of the Salt River Project, a federal reclamation project undertaken by the United States under the General Welfare and Property Clauses of the Constitution. Art. I, § 8, cl. 1; Art. IV, § 3, cl. 2. Indeed, the Project is the sole *raison d'etre* of the District; without the Project the District would have no reason to exist. ARS § 45-903.

Obviously, the District's transmission lines and other electric energy facilities are indispensable to its sale of

the electric power generated by the Salt River Project, the proceeds of which are entrusted to repayment of the cost of the Project to the United States. And, in generating, transmitting, and selling electric energy, the District is performing contracts with the United States, which the District has assumed.

Certainly, the District could not voluntarily surrender these functions and transfer these facilities to the City, at least without the consent of the United States. Far less may the City exact their involuntary cession through condemnation proceedings.

To hold to the contrary, as has the Arizona Supreme Court, is to expose all the properties and facilities of every federal reclamation project in the land, whether used for irrigation or power, to a forceful taking by local municipalities, and to subordinate federal governmental purposes to an artificially created municipal ascendancy.

The Superiority of the District's Public Use Over the City's Proposed Use

The establishment of federal reclamation projects is an exercise of congressional power "to promote the general welfare through large-scale projects for reclamation, irrigation, or other internal improvement . . . ." *United States* v. *Gerlach Live Stock Co.*, 339 U. S. 725, 738 (1950). The objective of a federal reclamation project, therefore, is clearly a federal public purpose. As this Court explained in *Ivanhoe Irr. Dist.* v. *McCracken*, 357 U. S. 275, 294-95 (1958):

> "In developing these projects the United States is expending federal funds and acquiring federal property for a valid public and national purpose, the promotion of agriculture. This power flows not only from the General Welfare Clause of Art. I, § 8 of the Constitution, but also from Art. IV, § 3, relating to the management and disposal of federal property."

Project power facilities are inextricably involved in the overall federal purposes of the reclamation scheme, and are therefore dedicated to the same federal use. See *Ivanhoe Irr. Dist.* v. *McCracken*, *supra*.

The authority of the United States to transfer its power facilities and privileges to the Association and the District, subject to the federal purposes of the reclamation project, "comes from the power of the Congress to condition the use of federal funds, works, and projects on compliance with reasonable requirements." *Ivanhoe Irr. Dist.* v. *McCracken*, 357 U. S. 275, 291 (1958); see *FPC* v. *Idaho Power Co.*, 344 U. S. 17 (1952); *United States* v. *San Francisco*, 310 U. S. 16 (1940).

Since, under its 1937 agreement with the Association, the District undertook the operation and management of the power system for the use and benefit of the United States, "the United States . . . [has] a direct and important interest as to how . . . [the District's power] system should be managed." *New York Trust Co.* v. *Farmers' Irr. Dist.*, 280 Fed. 785, 795 (8th Cir. 1922).

That the District was organized under state law and is a state subdivision does not change its nature as a federal instrumentality nor alter the fact that its power works and facilities are devoted to a federal use as a constituent part of the Salt River Project. The Arizona statutes authorizing creation of the District demonstrate that it was formed to permit it to function within the state as part of the Project.

In *Ivanhoe Irr. Dist.* v. *McCracken*, 357 U. S. 275, 295 (1958), this Court said:

> "[T]he Federal Government may establish and impose reasonable conditions relevant to federal interest in the [reclamation] project and to the overall objectives thereof. Conversely, a State cannot compel use of federal property on terms other than

> those prescribed or authorized by Congress. . . . Article VI of the Constitution, of course, forbids state encroachment on the supremacy of federal legislative action."

A fortiorari, neither a state nor a municipality may, under its power of eminent domain, interfere with the functions of a federal reclamation project and subject the project's power distribution system to a municipal use. On the contrary, where Congress has provided a regulatory system for federal projects, an inconsistent state system must yield to federal supremacy. *Nebraska* v. *Wyoming*, 325 U. S. 589, 615 (1945); *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U. S. 508, 535 (1941); *United States* v. *San Francisco*, 310 U. S. 16, 30 (1940); *Arizona* v. *California*, 298 U. S. 558, 569 (1936); *United States* v. *Rio Grande Dam & Irr. Co.*, 174 U. S. 690, 703 (1899).

The United States is supreme in all matters within the scope of its sovereignty, and therefore a "federal public use" is superior to all other uses. *United States* v. *Carmack*, 329 U. S. 230, 242 (1947). This is the rationale of the cases holding that the federal government may take by condemnation for a federal public use, property devoted to a conflicting state or municipal use. *United States* v. *Carmack*, *supra*. If a federal project for which property within a state has been taken by the United States will interfere with a similar legislative program of the state, the state "program must bow before the 'superior power' of Congress." *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U. S. 508, 535 (1941); *Florida* v. *Mellon*, 273 U. S. 12, 17 (1927); *Minnesota* v. *United States*, 125 F. 2d 636 (8th Cir. 1942). Conversely, federally-owned property situated within a state is not subject to the state's power of eminent domain. *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 405 (1917); *United States* v. *Minnesota*, 95 F. 2d 468, 470-71 (8th Cir. 1938), *aff'd* 305 U. S. 382 (1939).

The District's power distribution system, operated under contracts with the United States and the supervision of the Secretary of the Interior, has clearly been appropriated to the accomplishment of the purposes of a federal reclamation project—a "federal public use," superior to "all other uses." *United States* v. *Gerlach Live Stock Co.*, 339 U. S. 725 (1950); *United States* v. *Carmack*, 329 U. S. 230, 242 (1947); *United States* v. *O'Neill*, 198 Fed. 677 (D. Colo. 1912). It is therefore beyond the power of the City to take the District's property in condemnation.

The Violation of the Equal Protection Clause of the Fourteenth Amendment

The Arizona Supreme Court narrowly regarded the District merely as a public utility engaged in the business of supplying electric power at retail to customers (pp. 6a-7a)—"essentially a business corporation with attributes of sovereignty which are only incidental, conferred for the purposes of better enabling it to function and accomplish the business and economic purposes for which it was organized" (p. 13a). This mistaken classification of the District as an ordinary "public utility" "supplying electric power at retail to the ultimate consumer" (pp. 4a, 7a), led the court to its erroneous conclusion that the City's proposed use of the District's power facilities is "higher" or "more necessary" than the District's use (p. 14a).

Thus, the Arizona Supreme Court failed to recognize the true character of the District as an instrumentality of the United States, maintaining and operating the power system of the Salt River Project by the authority and under the supervision of the Secretary of the Interior, and selling excess power generated by the Project under a special act of Congress authorizing such sales, the proceeds of which are entrusted to the Reclamation Fund established by the Reclamation Act to reimburse the United

States for the cost of constructing, maintaining and operating the Project.

The result of the lower court's decision is an arbitrary and patently erroneous subordination of a federal public use to an inferior municipal use. Although the Arizona constitution and statutes were clearly intended to place the District on an equal footing with other municipal corporations and political subdivisions of the state, including the City, the Supreme Court's construction of those very same constitutional and statutory provisions results in an arbitrary, unreasonable and erroneous discrimination in favor of the City and against the District, in violation of the Equal Protection Clause of the Fourteenth Amendment.

Even assuming, as the state court held, that the District in performing its electrical energy functions is "engaging in business as a public utility" (p. 4a), it is equally true, as the court also observed (p. 9a), that the City is engaged in precisely the same type of "business function" in selling electrical energy at retail to its customers. In this view, there is no difference whatever between the electric services of the District and those contemplated by the City. The City's proposed use, therefore, cannot be deemed superior by reason of the character of the use, and, in reality, the Arizona Supreme Court's holding is based merely on a supposed difference in the character of the users. Indeed, the court's opinion cited only cases where a city's proposed use conflicted with that of a private utility company (p. 14a).

Hence, the lower court concluded that use of the District's transmission system by the City must be considered a "more necessary public use" simply because the City is a municipality (p. 14a). But both the City and the District are "municipal corporations" and "political subdivisions" of the state, clothed with the same powers of

eminent domain, tax assessment, and tax exemption. ARS §§ 9-511, 45-902, 45-939. Nevertheless, the Arizona Supreme Court has classified the District's power functions as merely a "utility undertaking," while elevating those same functions, when performed by the City, to the status of a "higher" or "more necessary" public use. There is no justification for this discrimination.

In order to satisfy the Equal Protection Clause,

> ". . . the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' " *Hartford Steam Boiler Inspection & Ins. Co.* v. *Harrison*, 301 U. S. 459, 462 (1937).

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373-74 (1886).

It follows that the subordination of the District's use to that of the City so as to permit the City to condemn the District's power distribution system constitutes an arbitrary discrimination against the District in violation of the Equal Protection Clause of the Fourteenth Amendment.

Conclusion

This appeal raises a federal question of importance and novelty in terms of constitutional principle as applied to the factual situation presented. The question is so substantial as to require for proper resolution plenary consideration, with briefs on the merits and oral argument. This is particularly true inasmuch as there is involved the right and power of a local municipality to exact by involuntary transfer and forced sale the surrender to it of facilities and properties of an irrigation district which are dedicated to a federal use in furtherance of the purposes of a federal reclamation project.

Respectfully submitted,

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APPENDIX A

Opinion of the Supreme Court of the State of Arizona of July 5, 1962

NABOURS, Judge of the Superior Court.

This action was brought by the City of Mesa, hereinafter called the City, for a declaratory judgment against the Salt River Project Agricultural Improvement and Power District, called the District, to determine the respective rights of the parties to serve electrical energy in certain areas within and adjacent to the corporate limits of the City. The District counterclaimed asking that the City be permanently restrained from competing with the District or interfering in any manner with the electric service to any area being served by the District. From a judgment in favor of the District the City appeals.

The City was first incorporated on the 1st day of June, 1883, as the Town of Mesa pursuant to the general territorial laws pertaining to cities and towns then in effect. Later it increased in size and population and was organized under the general laws of the State now Title 9 of the Arizona Revised Statutes. In October 1917, the City acquired the electrical distribution system of the Southside Gas and Electric Company serving the town, together with water and gas distribution systems and since has furnished all three utilities to its residents. The City's incorporated limits were then and for some thirty years thereafter an area of one square mile; however in 1949 and thereafter it annexed certain areas adjacent to the original townsite. In some instances territory was annexed which was unimproved in the sense that in part, at least, it was still devoted primarily to agricultural pursuits.

The District is an agricultural improvement district organized pursuant to the provisions of what is now Chapter 4, Title 45, A. R. S. 1956, for the purpose of reclaiming lands susceptible of irrigation. The predecessor in interest

to the District was the Salt River Valley Water Users Association, incorporated in 1903, under the General Corporation Laws of the Territory of Arizona. At the time of its organization the townsites of Phoenix, Tempe and Mesa were excluded from its boundaries. On or about March 22, 1937, the Salt River Valley Water Users Association, subject to the rights of the United States, transferred and assigned all its properties, real and personal, and rights therein, and all water and power rights, franchises and privileges to the District but continued to operate the works and facilities. In September of 1949 the District assumed and took over the maintenance and operation of the electric power system from the association and has continued the maintenance and operation to the present time, constructing canals, laterals and electric transmission and distribution lines over and along certain rights of way theretofore granted by the United States and individual landowners.

In 1929 the Central Arizona Light & Power Company, the City of Mesa and the District served electrical energy in Maricopa County. In general the service areas of the Central Arizona Light & Power Company were the incorporated areas of Maricopa County excluding the City of Mesa. The service of the City was confined to its incorporated limits with certain exceptions not of importance here. Prior to 1929 the Salt River Valley Water Users Association provided some retail electric service in rural areas, and supplied power at wholesale to Central Arizona Light & Power Company, and after 1922 and until 1949 to the City. In 1928 the Salt River Valley Water Users Association embarked upon a plan to provide electric service to rural areas in the Salt River Valley not then being served. Hydro-generating plants were constructed on the Salt River and a transmission system covering the entire area was shortly thereafter completed. Funds for this program were provided by the issuance of bonds.

Appendix A

In 1928 and 1929 as a prerequisite for the issuance of bonds territorial agreements establishing service boundaries were entered into with the Central Arizona Light & Power Company and with the City. The agreement with the City which also provided for the sale of electric energy for distribution to the City's customers was for a five year term, renewed in 1934 for five years and again in 1939 for ten years. Upon its expiration in 1949, the agreement was not renewed nor has any agreement been made since reserving to either party territory which each may serve to the exclusion of the other.

The great growth and development of the Salt River Valley and Maricopa County consistent with suburban living has resulted in the District greatly expanding its facilities and service. In the years following the adoption of the District's rural electrification program tens of thousands of people established homes within the District's boundaries and the District has increased and continues to increase its generative and distributive facilities. Its bonded indebtedness at the time of trial was $55,000,000. As a result of the District's expanding its lines and increasing its services and facilities together with the annexations made by the City whereby it extended its incorporated limits, the District is now serving customers within the City whom the City wishes to supply by its electrical services and facilities. The District refuses either to remove, abandon or sell its facilities now valued at over $900,000 in the areas in dispute or to desist from serving new customers where it has been doing business, claiming the right to continue to serve without competition and to expand its service therein without limit.

The City claims as a minimum that it has the exclusive right to serve all areas within its corporate limits, even though the same were acquired or extended by annexation and were being served by the District prior to annexation. It urges that a municipal corporation has the exclusive

control of its streets and alleyways and only the City can authorize the use of such streets and alleys for public utility purposes, and that no municipality or political subdivision may acquire a franchise to serve or a right to use the City's streets and alleyways within its territorial limits without its consent.

The District's exact status escapes a simple definition. It is not a "public service corporation" as set forth in the Constitution, Art. 15 § 2 and is not subject to regulation by the corporation commission as to its services and rates. State v. MacDonald, 76 Ariz. 401, 265 P. 2d 454. It is denominated a political subdivision of the state and entitled to all the immunities and benefits granted to municipalities by the Constitution or statutes, Constitution Art. 13, § 7 [Amendment of 1940]. Yet as a political subdivision its powers are obviously limited to the purposes justifying its political existence. The privileges and immunities granted extend only so far as they have a legitimate relationship to the legal objectives for which the District is organized. But whatever may be the District's exact status, plainly, the effect of selling electricity to the ultimate consumer at retail is to place the District in the position of engaging in business as a public utility for this is a business traditionally affected with public interest.

Essentially, three principal questions are raised by the overlapping of interest. First, can the District be required to terminate its electric service within the disputed areas by reason of the City's annexation. The answer to this question compels an examination of the District's precise legal position.

The District asserts an unrestricted right to use the streets and alleyways of the City by reason of the Constitution of Arizona and legislative enactment. As to the Constitution, the District claims by reason of Art. 13, § 7 thereof that its powers are as broad and its immunities

equal to those of a municipal corporation. Still the District may not claim by this provision more than a municipality could claim under like circumstances. Elsewhere in either the organic law, the statutes or the common law must be found support for the claimed right.

The District in part rests its claim to a continued use of the City's streets and alleyways on A. R. S. § 45-936 A. wherein the sale of electric power by the District is authorized in order to reduce the cost of irrigation. The District here is really claiming two rights: first, the right to sell electric power and second, to that end, the right to utilize the streets and alleyways within the incorporated limits of the City without its consent. The first, if construed to include the latter, would conflict with the express language of A. R. S. § 9-240 B., providing that the common councils of cities shall have the right to exercise *exclusive* control over their streets, alleys, avenues and sidewalks. Such a right can not be inferred as it clashes with accepted statutory construction.

The accepted principle is that courts will not render an interpretation of statutes which makes them contradictory to each other but must, if sound reason and good conscience allow, construe statutes in harmony. S. H. Kress & Co. v. Superior Court of Maricopa County, 66 Ariz. 67, 182 P. 2d 931. If there is inferred from the right to sell power the right to use the City's streets and alleys for that purpose, the two statutes would be contradictory and not in harmony. A construction denying the inference sought to be given harmonizes the express right to sell electricity with the exclusive control of streets and alleyways lodged in the City.

The District further claims the right to use the City's streets and alleyways on the language of A. R. S. § 45-938 C., providing:

> "C. The district shall have the use of and a right of way is expressly granted to it to locate, construct

> and maintain *the works* over, through and upon any of the lands which are the property of the state or any subdivision or institution thereof." (Italics supplied)

It is to be noticed that subsection C. refers to "the works". This is a reference to the preceding subsection A. which authorizes the District to construct, " * * * *any of the works* necessary to carry out any provision of this chapter, across any stream of water, watercourse, street, avenue, highway, railway, canal, ditch or flume which * * * the district may intersect * * *."

Statutes must be construed as a whole, and hence subsection C. will be interpreted in the light of and consistent with subsection A. Together subsections A. and C. *do not import* a special grant of power to enter into the distribution of electricity as a business in competition within the City without its consent. The whole of A. R. S. § 45-938 simply grants a right of way to pass over, through and upon any lands of the state and its political subdivisions where the works of the District intersect or cross. Such a statute does not confer a right to construct works longitudinally in a street. Town of New Castle v. Lake Erie & W. R. Co., 155 Ind. 18, 57 N. E. 516.

While the claim of the District to the use of the streets and alleys of the City does not find support in either Art. 13, § 7 of the Constitution of Arizona or the legislative enactments referred to, it is nonetheless certain that the District may not be required by the City to terminate its operations in the annexed areas without just compensation. Service by the District could have been initiated as early as 1913 under the amendment to the Articles of Incorporation of the Salt River Valley Water Users Association, Art. IV, Sec. 1. Thereafter by laws of 1922, Chapter 23, now A. R. S. § 45-936, the District through its board of directors could have executed and performed contracts

or agreements with any person, firm or corporation for the sale of power produced, owned or controlled by the District in order to reduce the cost of irrigation. It could have entered into contracts with any county or other political subdivision for furnishing power for the use of owners or occupants of land within the District. As the areas served by the Salt River Valley Water Users Association and later by the District became more densely populated, it utilized the foregoing powers and both residences and businesses accepted the services provided by the District—in the disputed localities approximately 1,600 connections. The District thus has been projected in a major fashion into the business of supplying electric power at retail to the ultimate consumer.

While we reject the claim of the District to the use of the streets and alleys within the incorporated limits of the City based upon the Constitution, Art. 13, § 7 and the statutes, A. R. S. §§ 45-936 and 45-938, this does not mean that the City may compel the District to terminate its services in the disputed areas simply because of their incorporation within the municipal limits. The legislature has granted to the District without restriction the right to sell power and the District has acted upon this grant by extending its distributing system so as to meet the reasonable needs of those inhabiting the disputed areas. Whether in so doing the District used the public roads of the state and county, private ways, easements asserted to arise out of the water right applications or a combination thereof is not material to the decision here. A large investment has been made in generating equipment and the various works necessary to supply power to consumers. The District by its investment has committed itself to a public utility undertaking plainly accepting the grant of the state to engage in that business. By such conduct a property right has been created which is protected by the Constitution, Art. 2 § 25 forbidding the enactment of

any law impairing the obligation of contract. Russell v. Sebastian, 233 U. S. 195, 34 S. Ct. 517, 58 L. Ed. 912; and see Blount v. MacDonald, 18 Ariz. 1, 155 P. 736.

If the public roads of the state or any of its political subdivisions have been used by the District in the operation of its distribution system, consent to such must necessarily be implied from the fact thereof. The District may not be ousted from the use of the public ways once having accepted by acting on the grant of the state. City of Seattle v. Western Union Telegraph Co., 21 Wash. 2d 838, 153 P. 2d 859; cf. Traverse City v. Consumers Power Co., 340 Mich. 85, 64 N. W. 2d 894; Southern Bell Telephone & Tel. Co. v. City of Meridian, 241 Miss. 678, 131 So. 2d 666.

If the District has been using private rights of way or a claimed easement, the use is permissive and property within the meaning of Art. 2 § 17, Constitution of Arizona forbidding the taking or damaging thereof without just compensation. The City cannot under the guise of a legislative grant to enlarge its corporate limits impair rights so protected.

We therefore hold that the District may not without just compensation be ousted from doing business in the disputed areas nor from the streets and alleys taken over by the City at the time of annexation or thereafter. What we have said is not, however, to be understood as exempting the District from the effect of reasonable regulatory ordinances controlling the uses of its highways and alleys.

Second, it is the City's position that if it may not oust the District from doing business, it has the right to compete with it in the disputed areas. While ordinarily two municipal corporations may not occupy the same territory and exercise the same authority and control over it and the population at the same time, South Park Com'rs. v. Chicago City Ry. Co., 286 Ill. 504, 122 N. E. 89, and see 2 McQuillin, Municipal Corporations § 7.08 (3rd ed. 1949), this is true

only as to governmental functions and not those of a proprietary nature. Public Utility District No. 1 v. Town of Newport, 38 Wash. 2d 221, 228 P. 2d 766. Here both parties are engaged in what is normally considered to be a proprietary or business function. Taylor v. Roosevelt Irr. Dist., 71 Ariz. 254, 226 P. 2d 154, and could freely compete unless sound reasons required a contrary conclusion.

The right to compete with the District in the disputed localities has been expressly denied by the legislature in its enactment of A. R. S. § 9-516 A. This statute clearly expresses the public policy of the state forbidding the competition of the City with the District in this language:

> "A. It is declared as the public policy of the state that when adequate public utility service under authority of law is being rendered in an area, within or without the boundaries of a city or town, a competing service and installation shall not be authorized, instituted, made or carried on by a city or town unless or until that portion of the plant, system and business of the utility used and useful in rendering such service in the area in which the city or town seeks to serve, has been acquired."

The legislative history of the foregoing statute is both significant and enlightening. This Court held in its modified decision in City of Tucson v. Polar Water Co., 76 Ariz. 404, 265 P. 2d 773, that a city could enter into an area being served by a public service corporation under a certificate of convenience and necessity and there compete with it. There was at the time of the decision no legislation purporting to control the respective rights of municipalities and public utilities where their competing interests overlapped. We said:

> "The city has its right or franchise in the form of a constitutional grant; the plaintiff [Polar Water

Co.] has its right or franchise in the form of a certificate of convenience and necessity issued by the Arizona Corporation Commission. This court has held in effect that in the absence of legislation a municipality may operate a public utility under its constitutional grant in competition with a private utility operating under a certificate of convenience and necessity. Menderson v. City of Phoenix, 51 Ariz. 280, 76 P. 2d 321. Therein the court held that any power of regulation concerning competition rested with the legislature if anywhere. While we shall not attempt to define the limits of the regulatory power of the legislature, we do say that merely because the constitution gives municipalities the right to engage in a utility business, it does not mean that the legislature is thereby stripped of its power to protect the franchises lawfully issued by the state and the businesses operated thereunder from damage or destruction caused by the activities of the municipality under its power of operation. There is no constitutional basis for saying that the legislature may not require its municipalities to pay just compensation for the damage or destruction of the business, franchise, or property of lawfully operating private utilities, even though such damage or destruction results from competition." 76 Ariz. 408-409.

Within two months the legislature enacted Chapter 105, Laws of 1954, now A. R. S. § 9-516. Most certainly, the language of the statute is broad enough to include the District's operations as a "public utility service under authority of law." Nor is it limited to the narrow interpretation advanced by the City that subsection A. is only applicable to public service corporations by the reason of the language of subsection B. authorizing condemnation actions

against a "public service corporation". Subsection A. is all embracive, reaching every service wherein the public interest is affected by the character of the business conducted. We will not import synonymity contrary to plain meaning unless the content of an act permits of no other conclusion. The statute must be given effect according to its plain and obvious meaning. Marquez v. Rapid Harvest Co., 89 Ariz. 62, 358 P. 2d 168; Gustafson v. Rajkovich, 76 Ariz. 280, 263 P. 2d 540.

The City predicates its right to compete with the District upon a claim of exclusive power to franchise utility undertakings within the confines of its incorporated limits. This claim is opposed to the general rule enunciated in 12 McQuillin, Municipal Corporations § 34.10 (3rd ed. 1950):

> "The power to grant franchises resides in the state; and a city, in granting a franchise, acts as agent for the state * * *."

This must necessarily be true since all powers of government are lodged in the people, Constitution Art. 2 § 2, exercised by the state subject to constitutional limitations. State v. Osborne, 14 Ariz. 185, 125 P. 884. The City derives its powers from the Constitution and the legislature and has only such powers as are expressly granted or can be reasonably implied therefrom. Town of Holbrook v. Nutting, 57 Ariz. 360, 114 P. 2d 226.

The exclusive right to grant franchises within its incorporated limits is sought to be implied from the language of Art. 13 § 4 of the Constitution stating:

> "No municipal corporation shall ever grant, extend, or renew a franchise without the approval of a majority of the qualified electors residing within its corporate limits who shall vote thereon at a general or special election * * *."

Appendix A

The language used provides a method by which franchises granted by a municipality may be exercised. It does not expressly provide that a municipality has the right to grant franchises within its corporate limits. That such can be inferred from the language used does not mean that the right is exclusive. The only inference of exclusiveness to be drawn is that the method of granting, extending or renewing franchises provided by the section is exclusive; otherwise, the dominant interest of the state is destroyed. It is difficult for us to understand how from the nonexclusive right to grant a franchise can be implied a separate, distinct and exclusive right by a municipality of control of streets and alleyways to the exclusion of the interest of the state. The control and use of highways is of state-wide concern. Clayton v. State, 38 Ariz. 135, 297 P. 1037. Moreover, the dominant interest of the state in the control and regulation of streets and highways is recognized in Art. 13, § 6 which charges: "No grant • • • of any municipality shall divest the State or any of its subdivisions of its or their control and regulation of such use and enjoyment; • • •."

It is urged that A. R. S. § 9-516, if construed to prevent the City from competing with the District within the limits of the City, is unconstitutional. This is predicated upon the language of Art. 13 § 5 of the Constitution which it is asserted gives to the City the unrestricted right to engage in the electric utility service within and without its corporate limits. Art. 13 § 5 reads:

> "Every municipal corporation within this State shall have the right to engage in any business or enterprise which may be engaged in by a person, firm or corporation by virtue of a franchise from said municipal corporation."

The consequences of the City's argument might follow if we were to hold that the City was without the means to

acquire the District's property in the incorporated area by eminent domain but we do not so hold.

This brings us to the third major question presented in this appeal. It is the City's position that if by annexation the District is not ousted from doing business and using the streets and alleys of the City and if it may not compete with the District, then it may acquire the District's facilities by eminent domain. In this we think the City is correct and that the trial court erred.

The District is a municipal corporation of a peculiar type. Local 266, Etc. v. Salt River Project Agr. Imp. & P. Dist., 78 Ariz. 30, 275 P. 2d 393; Rubenstein Const. Co. v. Salt River Proj. Agr. I. & P. Dist., 76 Ariz. 402, 265 P. 2d 455. Its primary function as that of an irrigation district has not been changed by the constitutional amendment, Art. 13 § 7. In conducting its ordinary business it is not exercising governmental or political prerogatives as it is not operated for the direct benefit of the general public but only those inhabitants of the District itself. Taylor v. Roosevelt Irr. Dist., 71 Ariz. 254, 226 P. 2d 154. On rehearing in the same case, 72 Ariz. 160, 232 P. 2d 107, we said that the adoption of the constitutional amendment in no sense altered the inherent characteristics of the District and that it is essentially a business corporation with attributes of sovereignty which are only incidental, conferred for the purposes of better enabling it to function and accomplish the business and economic purposes for which it was organized.

The right of eminent domain is an inherent right of sovereignty—that is to say, it is inherent in the people, exercised by the state subject to the restrictions and limitations to be found in the constitution. In re Forsstrom, 44 Ariz. 472, 38 P. 2d 878. In Arizona there is no constitutional prohibition against the taking of private property for public use except that just compensation shall be made. In-

spiration Consol. Copper Co. v. New Keystone Copper Co., 16 Ariz. 257, 144 P. 277.

We have heretofore noted that the District's power to sell electricity is a power incidental to its primary purpose of providing water for irrigation. Property may be taken which is already appropriated to some public use if it appears that the public use to which it is to be applied is a more necessary public use. A. R. S. § 12-1112 subsection 3. In City of Tucson v. The Tucson Gas, Elect. Light & Power Co., 152 F. 2d 552 (9th Cir. 1945), in a statement with which we do not quarrel the circuit court of the United States in speaking of § 12-1112 subsection 3 said:

> "* * * it is our view that the legislature must have considered that appellee's [The Tucson Gas, Elect. Light & Power Co.] whole utility is put to a higher use when operated by a municipality, * * *."

Cf. Arizona Corp. Com'n v. Tucson Gas, Electric Light & P. Co., 67 Ariz. 12, 189 P. 2d 907.

The authority of the City to acquire by condemnation the interests of the District is clear from an examination of A. R. S. §§ 9-521 and 9-522. A. R. S. § 9-522 authorizes the acquisition by the exercise of eminent domain of a utility undertaking or a part thereof subject to the requirements and restrictions of A. R. S. §§ 9-515 through 9-518. A utility undertaking is defined by A. R. S. § 9-521 as an electric light or power plant or system. cf. City of Scottsdale v. Municipal Court of Tempe, 90 Ariz. 393, 368 P. 2d 637.

The District argues that by subsection B. of A. R. S. § 9-516 the City's right is restricted to acquiring the facilities of a "public service corporation" by eminent domain. We do not think this necessarily follows. A. R. S. § 9-522 was originally enacted in 1943 and A. R. S. § 9-516 was enacted in 1954—Chapter 105, Laws of 1954. Chapter 105,

section 2 of the Laws of 1954 was specifically named as an amendment to Art. 6, Ch. 16 of the Code of 1939 "by adding" the subsection under consideration. Since no repeal was declared in the Act, presumably the legislature did not consider the contents as in conflict with other portions of the same chapter. [Chapter 16 of the 1939 code as supplemented.]

The District's interpretation would effect a repeal by implication of that portion of A. R. S. § 9-522, initially Chapter 31, Laws of 1943, which authorizes the acquisition of electric light or power plants or systems as utility undertakings. While a statute may be repealed by implication as well as by direct language, such repeals are not favored and will not be indulged if there is any other reasonable construction. Southern Pac. Co. v. Gila County, 56 Ariz. 499, 109 P. 2d 610. It is only when by no reasonable construction can two statutes be operative that the latter act repeals the former by implication. Burnside v. Douglas School Dist. No. 27, 33 Ariz. 1, 261 P. 629.

The inconsistency of the District's argument becomes more apparent when it is noted that the second sentence of A. R. S. § 9-516 B. provides that "Such action shall be brought and prosecuted in the same manner as other civil actions." An identical procedure in condemnation was already provided by A. R. S. § 12-1116 then § 27-909 A. C. A. 1939, in this language:

> "All proceedings for condemnation must be brought in the superior court of the county in which the property is situated, in the same manner as other civil actions. [27-909 A. C. A. 1939]"

Can it be said that A. R. S. § 12-1116 is in any way altered or repealed by the subsequent legislation? We do not believe the legislature's purpose in adopting subsection B. was to restrict A. R. S. § 9-522 but was simply to reaffirm

the right of eminent domain in particular as against public service corporations. The statutes should be construed in the light of the evil which they were designed to remedy. Peterson v. Sundt, 67 Ariz. 312, 195 P. 2d 158.

The foregoing settles the principal issues arising between the parties to this litigation. Other matters will be dealt with here summarily. The court below determined the boundaries of the disputed areas in favor of the District finding that the service area of the District was that generally established under the 1929 agreement. The City argues that some of the areas at the time of annexation were unimproved, which we take to mean principally devoted to farming, and that it can serve in the unimproved areas without paralleling the District's line. The court below found as a fact that the District provided adequate service within the disputed area when requested. It was reasonable to conclude pursuant to the language of A. R. S. § 9 516 A., supra, that the areas of service were not to be decided solely by whether the City was able to serve without paralleling the District's facilities.

In 1949 the City applied to the Arizona Power Authority for a Purchase Certificate and was granted a certificate for the following described areas:

> "The exterior boundaries of said applicant as are described in the official records of the County Board of Supervisors and County Recorder of Maricopa County, together with any and all annexations, proposed additions, territory served or proposed for service, constituting the immediate environs of said municipality."

The City maintains that such Power Purchase Certificate is authority for the City to serve in the disputed localities and prohibits the District from serving such areas. The District maintains that the certificate is void as it exceeds

the statutory authority granted under the Power Authority Act.

A. R. S. § 30-154 provides that certificates shall be granted as a matter of right in certain instances, to wit:

> "3. The application of any incorporated city or town for a power purchase certificate covering territory within its corporate boundaries not otherwise served with electrical energy.
>
> "4. The application of any incorporated city or town for a power purchase certificate for electrical energy to be distributed generally within its corporate boundaries where the city or town has acquired or has consummated all steps necessary to acquire the electric facilities of the distributor or distributors then serving the inhabitants of the city or town."

The Act within itself does not give the Commission authority to confer the right to engage in the distribution of electric energy. Its only function is to distribute available power to operating units. Any certificate granted by it to a city or town must be limited to the provisions contained in the statute. The District having been established in those areas which now the City seeks to serve, the Commission has no authority to grant electric power to the City for that purpose. To the extent that such certificate purports to embrace those areas herein disputed it is ineffectual to confer any rights.

The District points to certain water right applications executed by various landowners granting rights of way to the United States and its successors and assigns. Under the law applicable to this c ntroversy it is unnecessary to consider what, if any, rights emanate from such water right applications. An action for declaratory relief only justifies a declaration of rights upon an existing state of

facts, not one which may or may not arise in the future or which might or might not develop. Such can not form the basis for a declaratory judgment. Maricopa County v. Lepple, 69 Ariz. 220, 360 P. 2d 227; Moore v. Bolin, 70 Ariz. 354, 220 P. 2d 850.

The judgment of the court below is affirmed in part and in part reversed, with directions to enter a further judgment consistent with this decision.

WILLIAM W. NABOURS,
Judge of the Superior Court.

Concurring:

CHARLES C. BERNSTEIN,
Chief Justice.

JESSE A. UDALL,
Vice Chief Justice.

FRED C. STRUCKMEYER, JR.,
Justice.

LORNA E. LOCKWOOD,
Justice.

NOTE: The Honorable Renz L. Jennings being disqualified, the Honorable William W. Nabours, Judge of the Superior Court of Yuma County, Arizona, was called to sit in his stead.

APPENDIX B

Decision of the Superior Court of the State of Arizona, Maricopa County, May 26, 1959

This is an action for declaratory judgment. It is a case of considerable importance to the litigants—to Plaintiff, not only because of the tremendous increase in the size of the City of Mesa, both through territorial expansion and increase in population during the past decade but especially because of its anticipated growth in future; to Defendant, because of its huge investment in facilities for the production, transmission, and distribution of electrical energy in the Salt River Valley and the possible loss of markets for such energy resulting from competition and through the shift of the economy of that Valley from agriculture to industry which is largely responsible for the great increase in population with its conversion of the lands in farming areas into urban housing, business, and industrial uses.

Introduction

Basically, the conflict which the Court is called upon to resolve in this lawsuit is which of these public corporations, unregulated by any authority such as the Corporation Commission as to rates, service, etc., has the right to serve electrical energy to consumers in the territory embraced in areas annexed by the City?

Plaintiff has been in existence as an incorporated municipality since the year 1883; Defendant's predecessor in the electric power business, the Salt River Valley Water Users' Association, first came into being as a corporation in 1903 in anticipation of the construction of the Roosevelt Dam.

Among the reasons a determination of the issues herein are deemed of such grave concern by the City Council and other officials of the Plaintiff City is doubtless the trend, certainly not peculiar to Plaintiff but which is being experi-

enced by numerous cities throughout the country, towards annexation of areas adjoining and contiguous to incorporated territory, and the unrebuttable estimate of the experts that the population of the City of Mesa will reach approximately 150,000 by the year 2000. Compare this with the 1950 census of 16,790.

On the other hand, the officials of the Defendant are confronted with the fact the District has a bonded indebtedness of about $55,000,000, which constitutes a first mortgage on all of the lands of the Salt River Project, including all of the area surrounding the original townsite of plaintiff City, which comprised one square mile. It is their contention that without the great storage dams built by the Salt River Project, the huge investment of funds by the Association and District in developing its hydro and steam generating plants providing a source of electrical supply to the area, and its transmission and distribution system running to all areas in the Salt River Valley, the fabulous growth thereof would not have come about. The growth of the City of Mesa, as well as all other areas of the Valley, it argues, may be attributed directly and almost exclusively to the development of the Salt River Project.

It is conceded that the profits made by the City of Mesa from its utility business are used for its municipal purposes. They have been sufficient to enable the Plaintiff City to operate its various departments without the imposition of property tax. The revenues derived by the District from the operation of its utility have been and are used in aid of irrigation of the project. It has assumed, and is paying from such revenues, the obligations of the Salt River Valley Water Users' Association to the United States of America for the construction of the storage dams in the Salt and Verde Rivers and the canal system.

Thus the equities and economics of the situation as between these important litigants should become readily apparent to any impartial and unbiased observer. But we

think the law is sufficiently clear that this case must be decided thereon alone. Accordingly, after careful consideration of the law and the evidence, the Court's fact findings and legal conclusions may be stated as follows:

Findings of Fact and Conclusions

I.

That Plaintiff is a municipal corporation duly organized and existing pursuant to the general laws of the State of Arizona relating to cities and towns.

II.

That Defendant is an agriculturial [*sic*] improvement district organized and existing pursuant to Article 7, Chapter 75, Arizona Code Annotated, 1939 (Now Chapter 4, Title 45, A. R. S.).

III.

That an actual controversy of a justiciable nature exists between Plaintiff and Defendant involving the respective rights of the Plaintiff and the Defendant to serve electrical energy to consumers in certain areas within the corporate limits of Plaintiff City and certain areas adjacent thereto, and, that this action was brought pursuant to Article 7, Chapter 27, Arizona Code Annotated, 1939, as amended (now Chapter 10, Sec. 2, Title 12, A. R. S.), so that such controversy might be determined by a judgment in this action without other suits.

IV.

That Plaintiff City at the present time is, and for not less than 20 years immediately preceding the filing of this

suit has been, engaged in the business of furnishing to the residents and inhabitants of the Plaintiff City, and to others living beyond its corporate boundaries, gas, electric, and water utility services, and for such purposes it uses and has used the streets, alleys, and other public ways within its corporate limits and in the other areas served by it.

V.

That on the 7th day of November, 1938, the Mayor of Plaintiff City, in its name and pursuant to authorization of Plaintiff's City council, executed a written agreement with Salt River Valley Water Users' Association providing for the furnishing to Plaintiff by the Association of certain electrical energy which the Plaintiff required for resale and distribution to its customers within and without the then corporate limits of Plaintiff, which Agreement became effective on the 1st day of May, 1939.

That Article *II* of said Agreement provided that the Plaintiff was to serve shareholders of the Association located within the territory outside of the then city limits as shown as reserved for the Plaintiff by map marked Exhibit A. That the Association reserved the right to deliver and use, for its own purpose, electrical energy within such a territory lying outside of the corporate limits of Plaintiff, defined therein as reserved for the City, as might be required for the proper operation of the Salt River Valley Project. That the Association agreed that it would not serve electrical energy, except as provided in the Agreement, within the boundaries described as reserved for Plaintiff.

VI.

That Article *II* of the said Agreement and the maps referred to therein, and the territory therein described, were never amended, modified, changed or enlarged, but the

Plaintiff in certain instances, with the acquiescence of the Association, extended its electrical service to customers outside the boundaries designated on said map as the service territory of Plaintiff.

That the said Agreement expired on the 30th day of April, 1949, by virtue of its express terms, and has never been renewed, revived or extended.

That there is not now and has not been since April 30, 1949, any agreement or contract between Plaintiff and said Association or Defendant reserving to either the territory in which Plaintiff or said Association or Defendant might serve electrical energy to the exclusion of the other.

That during the period said Agreement was in effect, Plaintiff served all consumers of electrical energy in the said reserved territory except such as the Association delivered and used, for its own purposes, within the territory lying outside of the corporate limits of the Plaintiff, which was required for the proper operation of the Salt River Valley Project.

VII.

That said Association was incorporated in 1903 under the general corporation laws of the then Territory of Arizona for the purpose of furnishing water for irrigation, power for domestic and ordinary purposes, and providing drainage to and for the lands appurtenant to the shares held by members of the Association, and for the furtherance of such purpose to construct and operate, or to contract with the United States for the construction and operation, of dams, power plants, transmission lines, roads, canals, and other facilities incident to the storage, production, distribution and operation of irrigation, water, power and drainage works for the benefit of the lands subscribed to its Articles of Incorporation and within the boundaries of the Association as described in such Articles, such lands

being identical with the lands within the exterior lines established for the Salt River Valley Project.

That on or about the 22nd day of March, 1937, said Association, subject to the rights of the United States, transferred and assigned all its properties, real and personal, and rights therein, and all water and power rights, franchises and privileges, including the revenues derived from the same, to the defendant. However, said Association continued to operate all of said works and facilities so transferred until on or about September 12, 1949, at which time the defendant assumed and took over the maintenance and operation of the electric power system theretofore operated by said Association, and has continued such maintenance and operation down to the date of the filing of the complaint herein.

VIII.

That commencing in the month of January, 1949, Plaintiff annexed areas surrounding and contiguous to its corporate limits. That all proceedings and steps taken and had in connection with each such annexation were duly and regularly carried out and accomplished in accordance with the applicable Arizona statutes.

IX.

That during the year 1917 or prior thereto, each of the then owners of all of the lands adjacent to and surrounding the City of Mesa and including a major portion of the lands now within the corporate limits of Plaintiff, made, executed and delivered a so-called "water-right application" which was made in consideration of the Agreement of the United States and the Association to deliver water to said lands. That said application was duly recorded in

the Office of the County Recorder of Maricopa County and provided in part as follows:

> "I do hereby grant, bargain, sell, convey and confirm to the U. S. A. and its successors in charge of the project, all rights-of-way for ditches, canals, flumes, pipelines, telegraph and telephone transmission lines, or other structures now constructed by or under the authority of the U. S. for or in connection with the said project, and all rights-of-way that may be or become necessary and suitable, and that may be required for the prosecution and operation of the said project and for the construction, maintenance and operation of its canals, flumes, pipelines, telegraph and telephone transmission lines or other structures that may be constructed by or under the authority of the U. S. and its successors in charge of the project, to have and to hold the same, together with all the tenements, hereditaments, privileges and appurtenances thereto belonging or in any wise appertaining to the U. S. A. and its assigns and successors in charge of the project forever, subject notwithstanding to the conditions upon which the application is made."

That although there is no express grant of authority to maintain power transmission lines and/or distribution lines over any of the lands included in the recorded Application, the words of grant are broad enough upon which to base a finding that "'other structures that may be constructed by or under the authority of the U. S. A. for or in connection with the said project'' includes power transmission lines and distribution lines inasmuch as one of the avowed purposes of the U. S. A. and its successors was to provide transmission lines and other facilities incident to the dis-

tribution of power—that being part of the Association's general corporate powers and purposes. That Defendant therefore has easements and rights-of-way "forever" over and across said lands for the purpose of constructing and maintaining thereon power transmission lines, canals, pipelines and other structures and facilities necessary or convenient for the operation of Defendant's business, including the distribution and service of electrical energy to the inhabitants of all of said lands, that being a reasonable and necessary use in connection with the project purpose of the Salt River Valley Project.

That since the year 1917 or prior thereto the Association has continued to deliver water to the aforesaid lands and has complied with the terms of the said application.

X.

That at and prior to the time of said annexation in January, 1949, the Association was serving electrical energy to customers in certain portions of said territory so annexed at said time, and, that since the annexation in 1949 and since each subsequent annexation, said Association until September 12, 1949, and since that time Defendant has extended its electrical facilities and supplied additional customer services in each of the areas so annexed.

That neither the Defendant nor the Association before it ever had a franchise, license or permit granted or approved by a majority of the qualified electors of Plaintiff City to use the streets, alleys and public ways within the Plaintiff's corporate boundaries for the purpose of serving electrical energy to the now city residents and inhabitants.

That Plaintiff City and its officers, agents and representatives have from time to time objected to said Association extending its electrical facilities and installing elec-

trical lines and additional electrical energy customer services in the territory so annexed and that said officers and agents of Plaintiff have objected to the use by Defendant of streets, alleys and public ways within the corporate limits of Plaintiff.

That Plaintiff merely by annexing an area then being served by another utility does not have the exclusive right to serve the inhabitants of such area; annexation does not ipso facto make unlawful the continued occupation and service of the annexed area by a pre-existing utility.

That the control of streets and alleys within the corporate boundaries of a municipality is not exclusively vested in such municipality; the State retains jurisdiction over the streets and alleys in all matters of state-wide concern. The power to determine what is and what is not a purely local municipal affair is vested in the State and not the municipality. The Legislature has given to the cities the exclusive right to grant franchises but the regulation of the utility business when engaged in either by a public service corporation or municipal corporation is a matter of statewide concern.

That the Defendant was organized under Chapter 4, Section 45-901, et seq. A. R. S. 1956, Section 45-938 (C) of which provides:

> "The District shall have the use of and a right-of-way is expressly granted to it to locate, construct and maintain the works over, through and upon any of the lands which are the property of the State or any subdivision or institution thereof."

That the State, acting under Article 13, Section 2 of the Constitution, has by the foregoing quoted enactment authorized the Defendant to make a particular use of the streets and has thereby granted the Defendant an easement

to place its power lines on the streets and/or alleys of the Plaintiff. Therefore, the Defendant need not obtain a franchise from Plaintiff in order to operate as a utility within the area in dispute, which area is now within the corporate boundaries of Plaintiff. Defendant has an easement granted to it by the State.

That the State has no jurisdiction over the property of a municipality held and used in its proprietary capacity is recognized as a rule of law. However, the State may condemn such property for State use but in such a proceeding it would be governed by the same principles applicable to property privately owned. Where the municipality owns property in its political or governmental capacity it is subject to acts of the legislature and when said legislature expresses itself as it did by the above-quoted Chapter 4, Section 45-938 (C), the legislative intent is to be construed, if possible, to avoid an absurd conclusion or avoid making the statute invalid. It follows then that the legislature of the State of Arizona did not intend to grant Defendant a right-of-way over land held in a proprietary capacity but did intend to grant Defendant a right-of-way over land held in a political or governmental capacity and land devoted to a use suited to the exercise of that right-of-way, i.e., streets, alleys or public ways. The latter are the normal places for electric poles and transmission lines and the use of those public ways for such purpose is not inconsistent with other uses so long as unreasonable obstruction of such ways does not result. Electric transmission and distribution lines are normally placed in a street or alley along with telephone lines, sewer and water lines, and gas mains. Those when properly installed or constructed do not interfere with the use of public ways by the public at large.

Appendix B

XI.

That Article *II* of the agreement of November 7, 1938, between Plaintiff and the Association is a valid, legal contract as it is neither contrary to the provisions of the State Constitution or of the statutes; that Plaintiff as a municipality had authority to enter into the provisions of said Article *II* of said Agreement; and, that said Article was not void as against public policy.

XII.

That when an incorporated city, acting under authority of law authorizing cities to extend, enlarge and increase their corporate boundaries, annexes part of land belonging to a District which is also a municipal corporation, the said city acquires the right to exercise over the property and inhabitants of the annexed part of the District, the political and governmental powers delegated to the city by law.

That the Defendant District has a dual purpose: 1) An obligation to furnish irrigation water to all lands within the Salt River Valley Project having a vested water-right; and 2) constitutional authority to distribute and sell electric energy in aid of irrigation.

That the annexation of land within the Salt River Valley Project by Plaintiff does not divest such lands of their water-rights or excuse the obligation of the Defendant to deliver water thereto.

That irrigation and power districts have by law only certain limited governmental functions and said functions do not conflict with the ordinary governmental functions of a municipality. A conflict exists in this case because Plaintiff municipality, acting in its proprietary, not governmental, function, has elected to compete with a pre-existing utility in an area formerly part of the District but now annexed by the municipality.

Appendix B

XIII.

That Arizona law authorizes a municipality to exercise proprietary functions; that the business of selling electrical energy is such an accepted proprietary function.

That Defendant District was organized to provide water to lands within the Salt River Valley Project and to provide electrical energy to the owners of lands within the project and to all inhabitants thereof for domestic and ordinary purposes.

That Plaintiff is a municipal corporation and when engaged in the business of selling electrical energy, it does so as a public utility.

That Defendant is also a municipal corporation and when serving electrical energy it does so as a publicly-owned utility. That when Defendant District engages in a "proprietary function" it does not lose its "municipal" status and become a "public service corporation" and by 76 Ariz. 402 cannot do so.

That the Corporation Commission does not have jurisdiction over municipal corporations engaged in competing utility service to determine the service area and conflicts with respect to service areas; that there is no procedure under the Constitution or the statutory law of the State which may be specifically applied to a conflict between two municipal corporations engaged in the utility business in the same area for determination of their respective rights in the given area.

That the public policy of the State seems to be that of prohibition of duplication of utility service.

That regulated monopoly in the utility field has long been the established public policy of the State, and that policy is based upon statute and so construed by the Supreme Court in so far as privately owned utilities are concerned.

Appendix B

That in Sec. 9-516 A. R. S. 1956 the aim and intent of the legislature appears most clear when it stated as follows:

> "A. It is declared as the public policy of the State that when adequate public utility service under authority of the law is being rendered in an area within or without the boundaries of a city or town, a competing service and installation shall not be authorized, instituted, made or carried on by a city or town unless or until that portion of the plant, system and business of the utility used and useful in rendering such service in the area in which the city or town seeks to serve, has been acquired."

That the facts in this case do show that adequate utility service is being rendered by the Defendant within the boundaries of Plaintiff and that Defendant is engaged in the electric utility business within the now borders of the Plaintiff under authority of law. That, therefore, the afore-quoted statute is hereby construed as prohibiting Plaintiff City from duplicating the service of Defendant District within the disputed area and thus safeguard the prior existing rights of Defendant District as a regulated monopoly.

The fact that Section 9-516 does not grant Plaintiff a means of acquiring the facilities of Defendant District by eminent domain or otherwise does not render the act unconstitutional, for only private property may be taken for a public use by the Arizona Constitution; that one municipal corporation may not acquire by eminent domain or otherwise the property of another municipal corporation.

XIV.

That the authority of the Arizona Power Authority is: "to grant as a matter of right the application of any incorporated city or town for a power purchase certificate

covering territory within its corporate limits not otherwise served with electrical energy"; and "the application of any applicant shall be granted for so much of the territory included in its application as is then being served with electrical energy by it." There is then a limitation that no power certificate shall be issued to an applicant for territory which is then being served with electrical energy by a person or operating unit.

That the authority of the Arizona Power Authority is construed as being such that the application of a municipal corporation is not limited to areas within its corporate limits but may embrace areas beyond its city limits providing that at the time of the application the city is serving those areas and also providing that said areas were not already being served by another person or operating unit.

That the Arizona Power Authority is prohibited from selling power to a municipal corporation for resale in an area then being served by another agency.

That to the extent that the Power Certificate issued to the City of Mesa authorized the sale of power in areas already being served by Defendant, such Certificate is void and the use of the power derived pursuant thereto in such areas is illegal and such performance is to be enjoined. That an illegal sale of power by the Arizona Power Authority cannot ripen into a vested legal right by the passage of time.

SUGGESTED JUDGMENT

WHEREFORE, it will be ordered that when judgment is rendered herein it will ADJUDGE and DECLARE:

(1) That the Defendant does have and has had by virtue of the provisions of the water-right application of 1917, relating to those lands outside the then corporate limit of the Plaintiff but thereafter annexed or hereafter to be annexed by the Plaintiff, the right and authority to extend,

construct or maintain its poles, lines and facilities upon, over and across the streets, alleys and public ways of such annexed areas for the sale and delivery of electrical energy to the inhabitants and residents of Plaintiff City; that said water-right application gave and granted a right-of-way for reasonable and necessary uses in connection with the Project purposes of the Salt River Reclamation Project; and, that the defendant District is successor to the United States of America in charge of said project.

(2) That Defendant may construct, operate and maintain its poles, lines and facilities or extend the same over, upon and across the streets, alleys and public ways within the corporate boundaries of the Plaintiff as now or hereafter constituted, for sale and delivery of electric energy to Plaintiff's residents and inhabitants, without first securing a franchise from Plaintiff City.

(3) That Plaintiff does not have the right or authority to extend its electrical facilities and serve electric energy to its residents and inhabitants within its corporate limits in areas outside the exterior boundaries designated in the Agreement of November 7, 1938, between Plaintiff and said Association, but inside the boundaries of the Salt River Valley Project, which area is being adequately served by the Defendant District.

(4) That Article *II* of said Agreement of November 7, 1938, was a valid and legal provision and the Plaintiff had the power and authority to enter into the provisions of said Article *II* of said Agreement.

(5) That upon the annexation by Plaintiff of any land theretofore included within the Defendant District, Plaintiff acquired the right to exercise over the property and the inhabitants of the annexed part of the District, the political and governmental powers delegated to a city by law. However, the District retains in the annexed area

those certain limited governmental functions authorized it by law to accomplish its purposes, which functions do not conflict with the ordinary governmental functions of a municipality.

(6) That Defendant does have under Chapter 4, Section 45-938-C, A. R. S. 1956 a right-of-way for existing and future poles, lines and facilities upon, over and across the streets, alleys and public ways within the corporate limits of the Plaintiff as now or hereafter constituted for the same and delivery of electrical energy to the residents and inhabitants of the Plaintiff city, which corporate limits will not include the area reserved to the Plaintiff by the Agreement of November 7, 1938.

(7) That the acts and operations of the Defendant in serving electrical energy to the residents and inhabitants within the corporate limits of Plaintiff, but excluding the area reserved to Plaintiff by the Agreement of November 7, 1938, are not beyond the power of the Defendant and are not unlawful nor ultra vires.

(8) That the power purchase certificate issued the Plaintiff by the Arizona Power Authority, to the extent that it authorized the sale of power in areas then being served by the Defendant at the time of the Plaintiff's application, is void, and Plaintiff is to be enjoined from further competing with Defendant in such areas. That Plaintiff may sell, distribute and serve electrical power purchased from said Authority in all other territory described in said certificate including but not limited to all territory and areas annexed by Plaintiff in January, 1949, and subsequently, and to be hereafter annexed by Plaintiff, providing that those areas were not otherwise served with electrical energy by a person or operating unit. That the application of a municipal corporation is not limited to areas within its corporate limits but may embrace areas beyond

its city limits, providing that said areas were not already being served by another person or operating unit.

(9) That the pertinent provisions of Chapter 105, Laws of 1954, are operative and valid even though the effect of such provisions would operate to prevent Plaintiff from serving electrical energy to the residents and inhabitants within its corporate limits and from extending its electrical facilities to additional consumers within its corporate limits as now or hereafter constituted.

ORDER

NOW THEN, IT IS ORDERED that Defendant will cause proposed findings of fact and conclusions of law, not inconsistent herewith, as well as a proposed form of judgment, to be prepared, served and filed as expeditiously as may be, subject to objections by the Plaintiff.

IT IS FURTHER ORDERED that the Clerk of this Court shall, in conformity with Rule 77(f), notify the parties or their attorneys in writing that this decision and order has been filed in his offices; provided, however, that judgment shall not be entered until such findings of fact and conclusions of law and form of judgment have been settled, signed and filed.

Dated at Kingman, Arizona this 25th day of May, 1959.

CHARLES P. ELMER,
Judge of the Superior Court of the State of Arizona in and for the County of Mohave, presiding.

Filed May 26, 1959.

APPENDIX C

Judgment and Mandate of the Supreme Court of Arizona

To the Honorable the Superior Court of the State of Arizona in and for the County of Maricopa

GREETING:

Whereas, lately in the Superior Court of the State of Arizona in and for the County of Maricopa, before you in a cause between

CITY OF MESA, a municipal corporation,

Plaintiff,

v.

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, an Agricultural improvement district,

Defendant,

Case No. 83443:

said superior Court made and entered its judgment on the 3rd day of July, 1959, in favor of the defendant and against the plaintiff, as by the inspection of the record of the said Superior Court, which was brought into the Supreme Court of the State of Arizona by virtue of an appeal by defendant agreeably to the law in such case made and provided fully and at large appears.

And Whereas, in December, in the year of our Lord one thousand nine hundred and sixty, the said cause came on to be heard before the said Supreme Court, and was submitted for decision after argument of counsel.

On Consideration Whereof, it was on the 5th day of July in the year of our Lord one thousand nine hundred and sixty-two, ordered by this Court that the judgment of the said Superior Court in this cause, appealed from be, and the same is hereby affirmed in part and in part reversed, with directions to enter judgment consistent with this decision.

You therefore are hereby commanded that such proceedings be had in said cause, as according to right and justice, and to law, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Charles C. Bernstein, Chief Justice of the Supreme Court of the State of Arizona, the twenty-seventh day of September, in the year of our Lord one thousand nine hundred and sixty-two.

/s/ Sylvia Hawkinson,
Clerk of the Supreme Court of
the State of Arizona.

Order of the Supreme Court of Arizona Denying Rehearing

Appellee's Motion for Rehearing and appellant's objections thereto were carefully considered, and the Court being fully advised in the premises ordered: Motion for Rehearing denied.

Done in Open Court this 20th day of September, 1962.

B. The governing body of the municipality, in determining the cost of the utility undertaking for which bonds are to be issued, may include all costs and estimated costs of issuance of the bonds, all engineering, inspection, fiscal and legal expenses allowed by law, and interest which it is estimated will accrue on money borrowed or which will be borrowed during the construction period and for six months thereafter.

APPENDIX D

Arizona Revised Statutes Annotated § 9-522

9-522. *Power to issue bonds*

A. In addition to its other powers, a municipality may:

1. Subject to the requirements and restrictions of §§ 9-515 through 9-518, within or without its corporate limits, construct, improve, reconstruct, extend, operate, maintain and acquire, by gift, purchase or the exercise of the right of eminent domain, a utility undertaking or part thereof, and acquire in like manner land, rights in land or water rights in connection therewith.

2. Issue its bonds to finance the cost thereof.

3. Pledge to the punctual payment of the bonds and interest thereon an amount of the revenue of the utility undertaking, including improvements or extensions thereafter constructed or acquired, sufficient to pay the bonds and interest as they become due, and create and maintain reasonable reserves therefor. The amount pledged may consist of all or any part of such revenue.

APPENDIX E

Agreement

between

United States of America

and

Salt River Valley Water Users' Association

DATED JUNE 25, 1904

THESE ARTICLES OF AGREEMENT, Made and entered into this 25th day of June, one thousand nine hundred and four (1904), by and between the United States of America, acting in this behalf by Ethan A. Hitchcock, Secretary of the Interior, PARTY OF THE FIRST PART, and the Salt River Valley Water Users' Association, a Corporation duly organized and existing under the laws of the Territory of Arizona, PARTY OF THE SECOND PART, their successors and assigns,

WITNESSETH,

That Whereas, the Salt River Valley Water Users' Association is a corporation organized and existing under the laws of the Territory of Arizona for the purpose mentioned in its Articles of Incorporation, a copy of which is appended to this memorandum (which is marked "Articles of Incorporation referred to in the attached memorandum, and attested by the signature of the Honorable the Secretary of the Interior of the United States of America,

and of the President of the Salt River Valley Water Users' Association, for the purpose of identification") and are for every purpose of the interpretation, construction and consideration of this memorandum, and of the rights of the parties hereunder to be deemed, held, read and considered as if fully written out or printed herein, and deemed a part hereof.

And whereas the lands embraced within the district of lands described in Section three (3) of Article IV of said Articles of Incorporation are naturally desert and arid and incapable of proper cultivation without irrigation, and unless the waters of the Salt and Verde Rivers in Arizona and their tributaries be impounded and the flow thereof otherwise regulated and controlled will, to a greater or less extent, remain unreclaimed, unfit for habitation and uncultivated, in which condition they, or a great part thereof, are now.

And whereas the Secretary of the Interior of the United States of America contemplates the construction of certain irrigation works under the provisions of an Act of Congress entitled "An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," approved June 17, 1902, in and across Salt River at a point about 32 miles up the course of said Salt River above the confluence of the Verde River and said Salt River, said point being near the mouth of Tonto Creek, for the purpose of there impounding the waters of said Salt River and otherwise regulating and controlling the flow of water therein, and works necessarily or conveniently incident thereto, for the use of said waters for the reclamation of arid lands along the course of said Salt River and,

Whereas the incorporators of said Salt River Valley Water Users' Association and its shareholders are, and

under the provisions of its Articles of Incorporation must be, owners and occupants of lands and the appropriators of water from said Salt River and said Verde River and their respective tributaries for the irrigation thereof, and in addition thereto such incorporators, shareholders and constituents and their assigns or successors must initiate rights to the use of water from the said proposed irrigation works, to be constructed by the said Secretary of the Interior, as soon as such rights may be initiated and thereafter complete the acquisition thereof in the manner and upon the terms and conditions to be prescribed therefor by the Secretary of the Interior, which rights shall be, and thereafter continue to be, forever appurtenant to designated lands owned by such shareholders and constituent members, and

Whereas neither the relative priority and extent of the individual appropriations of such water heretofore made by said incorporators, shareholders and constituent members, nor the proportion of the entire waters of said water courses that has been in the aggregate appropriated by them, and which are now vested rights, have been ascertained or determined, but said incorporators, shareholders and constituent members of said Association have agreed, amongst themselves, by the terms and provisions of said articles of incorporation, upon the rules and principles by and upon which the relative priority and the extent of their several appropriations and vested rights to the use of such waters shall be determined.

1. Now, therefore, if the said Secretary of the Interior shall authorize and shall cause the construction of said irrigation works, then in the determination of the relative rights of the shareholders of said Association, and of their respective rights to the use of water acquired from the Government under said act of Congress, the rules and principles set out in said articles of incorporation, for such de-

termination, shall be deemed the established rules and principles for that purpose.

2. That only those who are, or who may become, members of said Association, under the provisions of its articles of incorporation, shall be accepted as entryman or applicants for rights to the use of water impounded, developed, or the supply of which is or may be regulated or controlled by said proposed irrigation works.

3. That the aggregate amount of such rights to be issued shall, in no event, exceed the number of acres of land capable of irrigation by the total amount of water available for the purpose, being (1) the amount now appropriated by the shareholders of said Association, and (2) the amount to be impounded and developed in excess of the water now appropriated. The Secretary of the Interior shall determine the number of acres so capable of such irrigation as aforesaid, his determination to be made upon due and expert consideration of all available data, and to be based upon and measured and limited by the beneficial use of water.

4. That the payments for the reservoir rights to be issued to the shareholders of said Association, under the provisions of said Act of Congress, shall be divided into not less than ten equal annual payments, the first whereof shall be payable at the time of the completion of said proposed reservoir, or within a reasonable time thereafter, and after due notice thereof by the Secretary of the Interior to the Association. The cost of said proposed irrigation works shall be apportioned equally per acre among those acquiring such rights.

5. The said Salt River Valley Water Users' Association agrees that it will promptly collect or require prompt payment in such manner as the Secretary of the Interior may direct, and hereby guarantees the payments, for that part of the cost of irrigation works, which shall be appor-

tioned by the Secretary of the Interior to its shareholders, and promptly pay the sums collected by it to the Receiver of the local land office for the district in which said lands are situate, that it will promptly employ the means provided and authorized by the said Articles of Incorporation for the enforcement of such collections and will not change, alter or amend its Articles of Incorporation in any manner whereby such means of collection, or the lien given to it by the shareholders to secure the payment thereof or of any assessments contemplated or authorized thereby, shall be impaired, diminished, or rendered less effective, without the consent of the Secretary of the Interior.

6. The United States shall in no manner be responsible for the sums collected by said Association until they have been paid into the hands of the receiver of the local land office, as provided by the law, and in accordance with such regulations as may be prescribed by the Secretary of the Interior.

7. That for the purpose of enforcing said collections, the Association will adopt and enforce proper By-Laws, subject to the approval of the Secretary of the Interior, and not change them, so as to in anywise impair their efficiency for said purpose, and will otherwise do any and all things it is authorized and empowered to do in the premises.

8. That the Association will adopt and enforce such rules and regulations as it is authorized by its Articles of Incorporation to adopt and enforce, concerning the use of water by its shareholders and concerning the administration of the affairs of the Association, to effectually carry out and promote the purposes of its organization, within the provisions of said Articles of Incorporation, which rules and regulations shall be subject to the approval of the Secretary of the Interior. That if the Association fail to make and adopt such rules and regulations then the Secretary

of the Interior may prescribe them but in such event it is understood that the Secretary of the Interior shall impose no rule or regulation interfering with any vested right of the shareholders of the Association as defined or modified by said Articles of Incorporation.

9. Persons who are not now members of the Association but who may be the owners or occupants of land within the Reservoir District described in section 3 of Article IV, or of added lands provided for in that section and to whom rights to the use of water, from the proposed reservoir or irrigation works, may be issued, may, at the designation of the Secretary of the Interior, become members of the Association by subscribing to the stock thereof, and upon the compliance with the other conditions prescribed for such membership.

10. It is understood that in all the relations between the Government and this Association and the members of the Association, the rights of the members of the Association are to be defined and determined and enjoyed by and under the provisions of the said Act of Congress and of other Acts of Congress on the subject of the acquisition and enjoyment of the rights to use water, and by the laws of Arizona where not inconsistent therewith, where such rights have vested, modified, if modified at all, by the provisions of the Articles of Incorporation of said Association.

11. Nothing contained in this memorandum, or to be implied from the fact of its execution, shall be construed, held, or deemed to be an approval by the Secretary of the Interior, nor an adoption by him, of the Articles of Incorporation of said Association, in all their details as the form of organization of water users contemplated and authorized by Section 6 of the said Act of Congress of June 17th, 1902, but such approval and adoption is expressly reserved until the conditions authorizing such approval and

adoption prescribed in said act shall have arisen. And when the Secretary of the Interior shall make, approve, and promulgate rules and regulations for the administration of the water to be supplied from said proposed irrigation works, such rules and regulations, and such modifications thereof as the Secretary may, from time to time, approve and promulgate, shall be deemed and held to be obligatory upon this Association as fully and completely and to every intent and purpose, as if they were now made, approved, promulgated and written out in full in this memorandum, and are to be read and construed as if so done.

In witness whereof, the undersigned have hereunto subscribed their names and affixed their seals the day and year first herein written.

(Sgd) ETHAN A. HITCHCOCK,
Secretary of the Interior,
for and on behalf of the United States
of America
PARTY OF THE FIRST PART

Witness:

(Sgd.) W. SCOTT SMITH

(Seal)

S.R.V.W.U. Ass'n.

SALT RIVER VALLEY WATER
USERS' ASSOCIATION
PARTY OF THE SECOND PART

By (Sgd) B. A. FOWLER,
President

(Sgd) FRANK H. PARKER
Secretary.

Witness:

(Sgd) JOSEPH H. KIBBEY
(Sgd) C. G. WILLIAMS

Appendix E

TERRITORY OF ARIZONA }
COUNTY OF MARICOPA } ss.:

Before me, SUSIE SCHERMERHORN, a Notary Public in and for the County of Maricopa, Territory of Arizona, on this day personally appeared B. A. Fowler, President of the Salt River Valley Water Users' Association and Frank H. Parker, Secretary of the Salt River Valley Water Users' Association, known to me to be the persons whose names are subscribed to the foregoing instrument and acknowledged the execution of such instrument as the free act and deed of the said Salt River Valley Water Users' Association, by each of them voluntarily executed.

Given under my hand and seal of office, this 25th day of June, one thousand nine hundred and four.

(Sgd) SUSIE SCHERMERHORN
(Seal) Notary Public.

My commission expires the 13th day of February, 1907.

APPENDIX F

Contract

between

United States of America

and

Salt River Valley Water Users' Association

DATED SEPTEMBER 6, 1917

THIS MEMORANDUM OF AN AGREEMENT, made by and between the UNITED STATES OF AMERICA, acting in this behalf by the Secretary of the Interior under the provisions of the act of June 17, 1902 (32 Stat., 388), and of acts amendatory thereof and supplementary thereto, together constituting the reclamation law, of the first part, and the SALT RIVER VALLEY WATER USERS' ASSOCIATION, a corporation, duly organized and doing business under the laws of the Territory (now State) of Arizona, of the second part and hereinafter for the sake of brevity of expression designated as the "Association" WITNESSETH:

FIRST: This agreement is to be held and deemed supplementary to the agreement made by and between the same parties, the memorandum whereof is dated June 25th, 1904, and it is understood and agreed that that agreement shall not be held or deemed in any wise to be affected, modified, changed or abrogated, in whole or in part, by this agreement, except as it may be done by the express terms of this agreement, or by reason of irreconcilable inconsistencies

between the terms of the said agreement of June 25th, 1904, and the terms of this present agreement, and then only in those particular provisions so expressly hereby affected, modified, changed or abrogated, or between which there is such irreconcilable inconsistency manifested, in which case and so far only, the provisions of this agreement shall prevail over and to that extent affect, modify, change or abrogate the provisions of said agreement of June 25th, 1904.

SECOND: In consideration of the doing of the things, and of the full and prompt performance by the Association of all the covenants and agreements hereinafter contained, which it hereby agrees that it shall do, perform and observe, and subject to all the conditions, terms, limitations and obligations hereinafter imposed upon it by the provisions of this agreement, the United States agrees to and will as soon after the signature of this agreement as may be practicable, turn over to and vest in the said Association, the care, operation and maintenance of the irrigation works known as the Salt River Project, situate in the counties of Gila, Pinal and Maricopa, consisting generally of the Roosevelt Dam, the Granite Reef Dam, irrigation canals, laterals and ditches, and other conduits, gates, pipes, power plants, power houses, buildings and other structures of every kind, transmission, telegraph and telephone lines, wires, pumps, machinery, tools and appliances and all property of whatsoever kind, real, personal or mixed, appurtenant to or used, or constructed or otherwise acquired to be used, in connection with the said Salt River Project, wheresoever said property may be situated, and as well, all water rights and franchises, and rights to the storage, diversion and use of water for irrigation or other purposes, water power, electric power and power privileges, with such right of possession of all thereof, as shall be necessary or convenient for the care, operation and mainte-

nance of said project by said Association, as hereinafter provided. And said Association shall from the time of the taking over of the care, operation and maintenance of said project thenceforward have and receive to its own use and benefit, all the rents, issues, profits, revenue and income, including all income from power and power privileges growing out of or arising from the operation and maintenance of the project and every part thereof by it.

THIRD: The Association agrees to accept the transfer to it of the care, operation and maintenance of said project, and that it will care for, operate and maintain the same and every essential part thereof in full compliance with law and the provisions of this agreement, during all the time it shall have such charge of the same under the provisions of this agreement, in such manner that the same and every part thereof shall remain in as good and efficient condition, and of equal capacity for the storage, development, diversion and distribution of irrigation water, and for the service of electric energy as the same is now, at its own cost and without cost to the United States, provided that said Association shall not be required to maintain the capacity of the Roosevelt Reservoir so far as that may be diminished naturally by the deposit of silt therein by the Salt River, Tonto Creek and other tributaries thereto; and provided further that the Association shall not be required to make any replacements, renewals or repairs which may be made necessary by injury to or destruction of said works or an essential part thereof by public enemies of the United States or by the United States itself as a war measure.

That it will promptly pay all such cost of the care, operation and maintenance of the project as it is incurred. That it will make no substantial change in any of said works, without first having obtained the consent thereto, to be expressed in writing, of the Secretary of the Interior. It

may, however, construct additional works at its own cost without the necessity of procuring the assent of the Secretary of the Interior of the United States, provided that such additional works shall not in any wise impair or diminish the present efficiency or adequacy of the project for the purposes for which it has been designed, constructed and acquired.

FOURTH: The Association shall repay to the United States the cost of the construction, and acquisition otherwise, of said project promptly and without default.

Such cost shall be computed on the basis of a net balance due the Government on that account on the 1st day of January, 1917, of $10,279,190.98. To this there shall be added any sums expended by the United States, or the cost of which it shall have incurred, on account of the construction, care, operation and maintenance of said project during the time elapsing between said 1st day of January, 1917, and the date upon which the Association shall take over the care, operation and maintenance thereof, under the provisions of this agreement. If the expenditures for operation and maintenance of the irrigation system shall be greater or less than the receipts from rentals up to the time when the project is turned over to the Association, the difference shall be paid to the United States by the Association in case of a deficit, or the difference shall be credited on the first installment in case of a surplus. Such adjustment to be made December 1, 1917.

The exact amount of the balance of such construction cost shall be computed to the date of the taking over by the Association of the care, operation and maintenance of said project, and then stated in writing by the Secretary of the Interior to the Association, and the amount so stated shall be deemed to be the net cost of said project which the Association agrees to pay to the United States.

Appendix F

Such payments shall be made in annual installments as follows:

Two	per cent	thereof on or before December 1st, 1917
"	"	" 1918
"	"	" 1919
"	"	" 1920
Four	"	" 1921
"	"	" 1922
Six	"	" 1923
"	"	" 1924
"	"	" 1925
"	"	" 1926
"	"	" 1927
"	"	" 1928
"	"	" 1929
"	"	" 1930
"	"	" 1931
"	"	" 1932
"	"	" 1933
"	"	" 1934
"	"	" 1935
"	"	" 1936

All without interest.

The Association shall pay all penalties which may be prescribed by the reclamation law for individual delinquencies.

The United States will and does reserve the means given to it by reclamation laws to enforce payments of installments of construction costs, and will at its option, in case of individual default, adopt, practice, and enforce them, as occasion may require, notwithstanding the undertaking of the Association to pay them.

Appendix F

FIFTH: The Association will use its powers and resources, cumulatively, if necessary, including the power to withhold the delivery of water, to enforce the rules and regulations made by the Secretary of the Interior under the provisions of law, or by the Association under its Articles of Association and by-laws, for the proper care, operation and maintenance of the project and for carrying out the provisions of this agreement. If the enforcing of any such rules and regulations shall require the collection of any charges, penalties or interest from persons holding land the title of which has not passed out of the United States, the Association shall report such cases to the Secretary of the Interior who will aid the Association in enforcing such collections by the cancellation of entries and water right applications or by any other means authorized by law. But failure on the part of the Secretary of the Interior to enforce such collections in such cases shall not relieve the Association from the obligations assumed by it under this agreement.

SIXTH: The Association shall use all practical methods to insure the economical and beneficial use of irrigation water. It shall also hold the United States harmless as to any damages which may accrue to other land or property either within or without the reservoir district growing out of the care, operation and maintenance of the project by the Association.

SEVENTH: The project and all its works and those connected with it may be inspected from time to time under the direction of the Secretary of the Interior when he shall deem it necessary to ascertain if the provisions of this agreement are being carried out and observed by the Association in the care, operation and maintenance of the project. The cost of such inspections shall be charged to the Association and become due to the United States on

March 1st of each year for expenditures on that account during the preceding year.

EIGHTH: The Association shall maintain all the works turned over to it under the provisions of this agreement in proper operating condition and make proper delivery of irrigating water to each farm entitled thereto, or at least as near to the farm as the United States is now delivering such water.

NINTH: This Agreement may be cancelled or terminated by the Association on March 1st of any year upon not less than one year's written notice thereof to the Secretary of the Interior. It may be amended at any time, such amendment to be ratified by a vote of the members of the Association in the same manner as the original agreement, and all amendments must be approved by the Secretary of the Interior before becoming effective. This agreement may be terminated by the United States acting in that behalf by the Secretary of the Interior, at any time, by written notice from the Secretary of the Interior in case the Association fails to carry out the provisions of law relating thereto, or of this agreement, in their true intent and meaning, or if the Secretary of the Interior shall reasonably believe that the security of the United States for the payment to it of said construction cost, is being impaired by the failure or neglect of the Association to properly care for and maintain the project. Upon the termination of this agreement, the Secretary of the Interior shall have the right to exercise all the powers in regard to the project which are vested in him by law, he may also at any time, after the execution of this agreement, take such action as he may deem proper, either by his own officers or through the Association, for the collection of any charges with the penalties and interest due the United States, which may be unpaid.

Appendix F

TENTH: The Association will keep reasonably accurate records of water deliveries and of crops raised under the project and as well such other records as are appropriate to the interests of the project as a whole. The forms to be used shall be subject to the approval of the Secretary of the Interior.

ELEVENTH: The performance and discharge of all valid and subsisting obligations and contracts affecting the care, operation and maintenance of the project now in effect between the United States and other parties, shall be and are hereby assumed by the Association, and shall be faithfully discharged, performed and carried out by it as long as the Association shall have the care, operation and maintenance of the project under the provisions of this agreement. The Association however reserves and the United States accords to it the right to any legal objections or defense to the validity of any obligations which the United States itself might have if this agreement had not been made, it being understood that the general assumption by the Association of the obligations of the United States in relation to the care, operation and maintenance of the project shall not impart to such obligations any degree of validity which they did not possess before this agreement was made. The Association agrees that all contracts which it may seek to execute for the sale or lease of power or power privileges covering a period of more than one year shall be subject to the approval of the Secretary of the Interior.

TWELFTH: The proper officers or agents of the Association shall have full and free access at all reasonable times to the project books and official records of the United States relating to the construction, acquisition, care, operation and maintenance of the project, with the right at any time during office hours, to make copies of and from the

same or any of them. The proper representatives of the United States shall have similar rights in respect to the books and records of the Association relating to the project and its care, operation and maintenance.

THIRTEENTH: The Secretary of the interior reserves, and shall have the right, so far as the purport thereof may be consistent with the provisions of this agreement to make reasonable rules and regulations, and to add to or modify them, as may be proper and necessary to carry out the true intent and meaning of the law and this agreement.

FOURTEENTH: Nothing in this agreement shall be construed as affecting or interfering with the right or authority of the Secretary of the Interior to withhold delivery of water to the project to an extent corresponding to the area for which construction or building charges, with penalties and interest, have not been paid to the United States, as may be required by law and by the terms of this agreement and the Association shall upon direction of the Secretary of the Interior withhold delivery of water in such cases.

FIFTEENTH: The Association will in every practicable way cooperate with the Secretary of the Interior in carrying out the provisions of Section 2 of the act of Congress of May 19, 1916 (39 Stat., 130), providing for water rights for 631 Salt River Indian allotments of 10 acres each, and will cause to be performed such work as may be deemed necessary by the Secretary of the Interior to carry into effect the provisions of said law. The expense of such work will be met by the United States.

SIXTEENTH: If at any time before the full repayment to the United States of the cost of said project, said project or any essential part thereof shall be injured or destroyed

by public enemies of the United States, or if said project or any essential part thereof, should as a war measure be injured, destroyed or rendered useless by orders of the United States or its officers, then further repayment of such construction cost shall be suspended and postponed until such time as said project shall have been restored to its state of effieiency and capacity just prior to such injury or destruction.

If by reason of invasion or occupation by enemies to the United States of territory of the United States, the water users (the constituent members of the Association), shall be prevented from the use of said project, or an essential part thereof, then during any period of such prevention of use, the repayment to the United States of construction cost under the provisions of this agreement, shall be suspended and postponed until such time as such use can be safely and uninterruptedly resumed.

SEVENTEENTH: All agreements made, or that may hereafter be made by any of the members of the Association under the "Public Notice" heretofore issued relating to said project to repay to the United States the cost of said project at a different rate per acre or otherwise, than that to be fixed by the Secretary of the Interior under the provisions of this agreement, are to be deemed to be and they each and all, are hereby modified so that the cost of the construction agreed thereby to be repaid shall conform to that fixed by the Secretary of the Interior under the terms of this agreement.

EIGHTEENTH: No member of or delegate to Congress or resident Commissioner after his election or appointment or either before or after he has qualified or during his continuance in office, shall be admitted to any share or part of this contract or agreement, or to any benefit to arise

thereupon. Nothing however herein contained shall be construed to extend to any incorporated company, where such contract or agreement is made for the general benefit of such incorporation or company, as provided in section 116 of the act of Congress approved March 4, 1909 (35 Stat., 1109.)

IN WITNESS WHEREOF, The undersigned have hereunto subscribed their names and affixed their seals this 6th day of September, 1917.

WITNESS:
E. C. BRADLEY (Sgd)
E. C. FINNEY (Sgd)

(Seal)

WITNESS:
ADAH C. TROUTMAN (Sgd)
A. B. LANDREENE (Sgd)

(Sgd) ALEXANDER T. VOGELSANG
Acting Secretary of the Interior for and on behalf of the United States of America PARTY OF THE FIRST PART.

SALT RIVER VALLEY WATER USERS' ASSOCIATION
JOHN P. ORME (Sgd)
President

CHAS. A. VANDERVEER (Sgd)
Secretary

APPENDIX G

Contract
between
Salt River Valley Water Users' Association
and
Salt River Project Agricultural Improvement and Power District

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DATED MARCH 22, 1937

AS AMENDED BY AGREEMENTS BETWEEN SAID PARTIES DATED FEBRUARY 28, 1944 AND SEPTEMBER 12, 1949

THIS AGREEMENT, Made and entered into this 22nd day of March, 1937, by and between SALT RIVER VALLEY WATER USERS' ASSOCIATION, a corporation organized and existing under the laws of the Territory, now the State of Arizona, hereinafter called the "Association," and SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, an Agricultural Improvement District, organized under the laws of the State of Arizona, hereinafter called the "District."

WITNESSETH:

THAT WHEREAS, the Association was incorporated on February 9, 1903, under the general corporation laws of the Territory of Arizona, for the purpose of furnishing water for irrigation, power for domestic and ordinary purposes, and providing drainage, to and for the lands appurtenant to the shares held by members of the Association, and for the furtherance of said purposes to construct and operate, or to contract with the United States for the construction and operation of, dams, power plants, transmis-

sion lines, roads, canals, and other facilities incident to the storage, production, distribution, and operation of irrigation, water, power, and drainage works for the benefit of the lands subscribed to the Articles of Incorporation of the Association, and within the boundaries of the Association as described in its Articles of Incorporation, said lands being identical with the lands within the exclusion lines established by order of the Secretary of the Interior of the United States limiting and defining the lands within the Salt River Project, a Reclamation Project of the United States under the Act of Congress known as the Reclamation Act of 1902, and Acts amendatory thereof, and

WHEREAS, the Association, pursuant to the purposes expressed in its Articles of Incorporation, by contract with the Secretary of the Interior acting for the United States, dated June 25, 1904, undertook and agreed, as agent for the United States, to collect from the owners of lands within the Association and to pay over to the United States, installments of principal and interest due the United States for the construction and operation of the works to be constructed and operated by the United States in connection with the said Salt River Project; and by a second contract with the Secretary of the Interior of the United States, dated September 6, 1917, and contracts supplementary thereto, undertook as agent for the United States the care, operation, completion, extension, improvement and maintenance of the said storage dams, power plants, equipment, and other properties necessary or incidental to the storage, production and distribution of water and power, and necessary to drainage, constructed, purchased and equipped by the United States or constructed, purchased and equipped by the Association with the approval of the United States and placed upon land owned by the United States; and by contract dated November 26, 1935, has agreed to repay to the United States the cost of the construction by the United States of a storage dam on the Verde River, and of improvements to the spillways of existing dams, which to-

gether are estimated to cost Six Million Dollars ($6,000,000) and which when constructed will become a part of said Salt River Project and be operated and maintained by the Association under the said contract of September 6, 1917; all of the foregoing properties and the operation thereof being, under the Act of Congress of June 17, 1902 (known as the Reclamation Act) and acts amendatory thereof, vested in the United States and comprising the Salt River Project, a Reclamation Project of the United States under the said Reclamation Act and acts amendatory thereof; said contracts by the Association being non-assignable, and

WHEREAS, the Association, in furtherance of the objects for which it was incorporated, has expended or undertaken the payment of the following amounts for the construction by the United States or by the Association with the approval of the United States, upon the lands of the United States, without or within the boundaries of the Association, and for the equipment of storage dams, diversion dams, power plants, distribution and communication lines, roads, bridges, power and irrigation canals, laterals, ditches, pumping plants, pipe lines, and other properties and facilities, all of which are owned by the United States, to-wit:

Cost of Roosevelt Dam, power plant, and other works erected and equipped by the United States prior to September 6, 1917	$10,166,021.97
Cost of other dams, power plants, pumping plants, and improvements erected by the Associataion with the approval of the United States	20,083,081.79
Cost of Equipment	459,160.37
Association's share of new Verde Dam, and completion of spillways	6,000,000.00
TOTAL	$36,708,264.13

of which total cost there is unpaid and outstanding at the present time the following items:

1.	Mormon Flat 6% Gold Bonds, dated Feb. 1, 1923, due 1938-47 ...	$ 1,621,000.00
2.	Horse Mesa 6% Serial Gold Bonds, dated Aug. 1, 1924, due 1938-43 ...	2,322,000.00
3.	Stewart Mountain Power Project 5½% Serial Gold Bonds, dated June 1, 1928, due 1931-58	3,746,000.00
4.	Refunding Gold Bonds 6%, dated Nov. 1, 1930, due 1956	3,000,000.00
5.	Roosevelt Agricultural Improvement District No. 1, 6% Bonds, dated Aug. 1, 1924, due 1936-54....	629,000.00
6.	Agricultural Improvement District No. 2, 6% Bonds, dated May 31, 1924, due 1939-54	1,554,000.00
7.	Lehi Agricultural Improvement District, 6% Bonds, dated Feb. 28, 1925, due 1937-50	100,000.00
8.	United States Reclamation Fund (Roosevelt Dam Balance)	3,049,806.56
9.	Reconstruction Finance Corporation (not for refinancing purposes)	99,989.03
10.	Association's approximate proportion of cost of new Bartlett Dam on Verde River and spillway completion of other dams to be constructed by the United States	6,000,000.00
	TOTAL	$22,121,795.59

Appendix G

WHEREAS, all of the works described in the foregoing paragraph are necessary and useful for the proper irrigation of, and the supply of power and drainage to, the lands included within the boundaries of the District, and

WHEREAS, when the Association was incorporated on February 9, 1903, as above recited, the Territory of Arizona had no laws providing for the incorporation of public corporations or political subdivisions of the Territory for the purpose of irrigating and of supplying drainage and power for farm and domestic use to lands within the Territory, making it necessary to incorporate the Association as a private corporation under the general corporations laws of the Territory, and without the rights, privileges, exemptions and immunities ordinarily granted to and held and enjoyed by such public corporations and political subdivisions of States and Territories of the United States, to-wit, the right of perpetual succession, the power of eminent domain, the power to compel inclusion of lands within the boundaries of the Association, the power to levy and collect taxes, and the exemption of the property and bonds of the Association from local, State and Federal taxes, and

WHEREAS, the State of Arizona by various statutes and parts of statutes included in the Revised Code of the State of Arizona of 1928, under paragraphs 3467 to 3514, both inclusive, and by acts amendatory thereof, particularly by Chapter 10, of the Acts of the Twelfth Legislature of the State of Arizona, First Special Session, has provided that, for the purposes for which said Association was incorporated, Agricultural Improvements Districts may be organized within the State under certain conditions and by certain methods of procedure set forth in the above recited paragraphs, as amended, and has in said paragraphs, as amended, granted and delegated to such Agricultural Im-

provements Districts the powers, privileges, rights, exemptions and immunities hereinabove recited as being prohibited to the Association, and

WHEREAS, in order to secure for the lands of the Association the above mentioned powers, privileges, rights, exemptions and immunities, all of the lands subscribed to the Articles of Incorporation of the Association and within the exclusion lines of the Salt River Project, the same being identical, have been organized under the provisions of said Paragraphs 3467 to 3514, both inclusive, of the Revised Code of Arizona, 1928, as amended, as an Agricultural Improvement District, being the Salt River Project Agricultural Improvement and Power District, one of the parties to this Agreement, and

WHEREAS, although the lands, the purposes and the interests of the Association and of the District are identical, it is nevertheless necessary, in order that the lands within the Association and the District shall fully possess all of the rights and privileges granted to either organization by the laws of the State of Arizona, and that the Association may perform its above recited agreements between the United States and the Association, that both the Association and the District shall be and remain in existence and in authority in and over the lands of the Association and of the District, and

WHEREAS, in order to define the powers to be exercised and the duties to be undertaken respectively by the parties hereto in accomplishing the purposes for which they were respectively incorporated and organized, the Association and the District have mutually agreed that the Association shall continue to construct, complete, extend, improve, operate, care for, maintain and repair the works of the Salt River Project, and shall sell, lease, or otherwise dispose of

surplus water and power as agent for the United States, the owner thereof in accordance with the provisions of the above recited contracts between the Association and the United States, and shall continue to contract with the United States when necessary for the repayment to the United States of any sums expended by the United States in connection with said Salt River Project, and that the District shall become and be the holder and owner of all properties, real and personal or rights therein purchased, leased or otherwise acquired, necessary or useful to the purposes for which the Association and the District, or either of them, were organized, except such property or rights in property now held or hereafter taken in the name of the United States, and that the District, shall under the authority conferred upon it by Sections 3467 to 3514, inclusive, of the Revised Code of Arizona, 1928, as amended, finance and refinance as its own obligation, the indebtedness of the Association now existing or hereafter incurred by it in exercising the powers and performing the duties assumed by the Association under this Agreement.

NOW, THEREFORE, in consideration of the premises as well as of the several covenants, promises and agreements hereinafter set forth, the parties hereto have agreed, one with the other, as follows:

1. The Association agrees to continue to perform, discharge and comply with the several duties, obligations and covenants, assumed, undertaken and made by the Association in its contracts with the United States dated respectively June 25, 1904, September 6, 1917, and November 26, 1935, and contracts amending or supplementing the same, now in force or hereafter to be made; to make and perform such further agreements with the United States as may be necessary or useful in accomplishing the purposes for which the Association and the District were organized; or which

the Association may be required to enter into and perform under the Federal Reclamation Act or acts amendatory thereof; to obey and comply with such rules and regulations now in force or hereafter lawfully promulgated by the Secretary of the Interior, under the said Reclamation Act, or acts amendatory thereof; to execute and perform all contracts now in force or hereafter deemed by the Association necessary or advantageous to the Association and the District for the generation, development, distribution and sale of surplus water and power or the drainage of lands; and generally to undertake and perform all things necessary or incidental to the full and complete discharge of the functions and duties set forth in the last paragraph of the preamble to this Agreement as being assumed by the Association in the making of this Agreement. The Association agrees that in each and every respect all things which it shall agree or do, in performing the duties assumed by it in this paragraph, shall be agreed or done by it for the use and benefit of the District and its lands.

2. The Association agrees, subject to the rights of the United States under the Reclamation Act, to make, execute and deliver to the District proper deeds and other conveyances of title to lands or interests in lands or rights therein or thereon now held in the name of or owned by the Association, together with the structures thereon and used by the Association in carrying out the purposes of its incorporation and its contracts with the United States hereinabove recited.

3. The Association agrees at the end of each calendar year, or as soon thereafter as is practicable, to pay over to the Treasurer of the District for the purposes of this Agreement, all revenues collected or received by it and not required to be held, expended or reserved by it, in carrying out the terms and provisions of its contracts now in force or hereafter to be executed with the United States, or in

performing the duties assumed by the Association in this Agreement. Reserve shall include adequate provision for future replacements, improvements, extensions, renewals, and construction of all of the works, equipment and appliances used in the operation of said Salt River Project.

4. The Association agrees, unconditionally, to guarantee payment of principal and interest, when due, on bonds or other obligations of the District made and issued by the District in accordance with the terms and conditions of this Agreement; to make and perform, pursuant to and in furtherance of said guarantee, such covenants, pledges, stipulations and agreements with the Trustee or Trustees, or with the holders of said bonds or other obligations of the District, as it may reasonably be required to do in furtherance of the purposes of this Agreement, subject, however, to the provisions of its Articles of Incorporation, its By-Laws, the Constitution and laws of the State of Arizona and of the United States, and its contracts now in force or hereafter to be made by it with the United States and with others.

5. The Association agrees that it will, annually, in protection of its contract of guaranty, assess, levy and collect an assessment equal to the tax levied by the District, which said assessment shall be cancelled or credited to the lands of the Association only when and if the respective owners thereof shall present to the Treasurer of the Association a proper receipt showing payment in full of taxes and penalties levied by the District in the calendar year for which the assessment was made by the Association. The Association agrees that it will invoke and enforce in the assessment and collection of said assessments all of the rights, remedies, penalties and powers against the lands which it shall, at the time of such assessment, have, possess and enjoy.

6. The Association agrees that it will use the bonds or other obligations of the District (or proceeds of bonds sold) authorized, made, issued, sold or exchanged by the District under this Agreement and turned or paid over to the Association, only for the purpose of retiring by payment or exchange all or part of its present outstanding obligations hereinabove recited, or in making payment to the United States for the construction of project works under contracts now in force or hereafter to be made between the Association and the United States; or for extending, improving, completing, renewing or replacing project works, equipment and appliances, under its contracts now in force or hereafter to be made with the United States, or undertaken by the Association with the approval of the United States. The Association agrees to use the Thirteen Million Dollars ($13,000,000.00) of bonds (or the proceeds of sale thereof) mentioned in paragraph 9 infra, only for the purpose of calling and redeeming, by payment or exchange, the issues of its bonds described in the list of Association indebtedness under items three (3) and four (4) thereof, and for the purpose of paying when due or of exchanging for District bonds the issues numbered one (1), two (2), five (5), six (6) and seven (7) in said list in whole or in part, and for the purpose of paying the costs, expenses, fees and charges necessary or incidental to the refinancing of the above items in accordance with the provisions of this Agreement.

7. The District agrees that it will hold title to all properties conveyed or assigned to it under the provisions of Paragraph 2 of this Agreement, for the use and benefit of the United States, insofar as the United States may have an interest therein under the Reclamation Act and its amendments, and subject to disposition of such interest by order of the Secretary of the Interior of the United States, or other officer designated thereto by the Act of

Congress known as the Reclamation Act, or acts amendatory thereof.

8. The District agrees that it will use the revenues annually turned over to it by the Association under the terms of Paragraph 3 of this Agreement, only for the purpose of paying principal and interest, when due, or to accumulate reserves for the payment of future principal and interest when due, of the bonds and obligations of the Association now outstanding as above set forth, and in accordance with the covenants and agreements of the Association contained in any trust agreement securing any part of said indebtedness; or to pay installments of principal and interest, when due, of bonds or other obligations of the District made and issued pursuant to the terms and conditions of this Agreement.

9. The District agrees that it will, and by these presents does, assume and agree to pay, as and when due, as its own obligaiton, all of the principal and interest hereafter to become due and payable upon any or all of the ten items of indebtedness of the Association now outstanding, as set forth in the preamble of this Agreement. The District agrees that, immediately upon the execution of this Agreement, it will call a Special Election of its qualified electors and will present to them for approval or rejection at said election the question whether the District shall presently make, execute and issue to the Association, to be used by the Association for the purposes of this Agreement, the serial bonds of the District in the aggregate amount of Thirteen Million Dollars ($13,000,000.00) in denominations of not less than Five Hundred Dollars ($500.00) and not more than Ten Thousand Dollars ($10,000.00) each, bearing interest at a rate not to exceed five per cent (5%) per annum and maturing at such times and in such amounts as the Association may direct, subject to the limitations of the laws of the State of Arizona

pertaining thereto. If the electors of the District shall authorize said issue of bonds by a majority of the acres voted at said election, the District agrees that it will forthwith proceed to prepare, make, execute and deliver to the Association its bonds or proceeds of bonds sold in the principal sum, in form and tenor, in denominations and maturities as hereinabove recited, or as required by the Association, with appropriate coupons for interest attached, subject however to the limitations and requirements of the laws of the State of Arizona in force at the time of issue, to be used by the Association only in accordance with the provisions of this Agreement.

The District agrees, subject to the limitations of law, when hereafter requested in writing by the Association so to do, to present to its electors, at regular or special elections called for the purpose, similar questions as to whether the District shall make and issue to the Association its bonds or other obligations in furtherance of the purposes and provisions of this Agreement, and in compliance with the requirements of the duties and obligations assumed by the District hereunder.

The District further agrees that, if its electors shall at any such election authorize the issue of bonds in the amount and upon the terms proposed, it will forthwith make, execute, issue and deliver to the Association its bonds or other obligations or proceeds of bonds sold in the amount authorized and in form and tenor as required by the Association, provided however that the requirements of the Association shall not violate the laws of the State of Arizona then in force with respect to bonds issued by such District. The District agrees that in connection with any issue of its bonds or other obligations made in accordance with this Agreement, it will, in addition to the terms and conditions contained in the body of each bond and coupon attached thereto, join with the Association in any indenture of trust which the Association and the District may law-

fully be required to make in connection with any issue of bonds authorized under this Agreement.

10. The District agrees that it will annually, at such times as are required by the laws of the State of Arizona, determine the total amount of tax necessary to be raised each year in carrying out the provisions of this Agreement, and in performing the duties imposed upon agricultural improvement districts by law. That it will return said amount together with the list of land owners within the District and the number of acres owned by each of them, to the Board of Supervisors of Maricopa County in manner and form and at the times required by law. That it will use the revenues derived from the taxes so levied annually solely for the purposes of carrying out the provisions of this Agreement and for the payment of necessary operating expenses of the District allowed by law.

11. The District agrees that it will, from time to time, upon written request of the Association, exercise its power of eminent domain over any lands within the District necessary or useful in carrying out the purposes of the Association and the District and the contracts of the Association with the United States then in force. That it will permit the Association to use said lands when so condemned and appropriated for any purpose for which the District might lawfully use them, and that in such use the Association shall act as the duly authorized agent of the District thereto. This paragraph shall not prevent the Association from condemning lands for Association purposes in the name of the United States, with the approval of the Secretary of the Interior, when such action shall be, in the opinion of the Association or the Secretary, necessary or desirable.

12. It is mutually agreed, inasmuch as the District will have no opportunity to levy and collect taxes for the year 1937, that the Association will pay for and on behalf of the

District all necessary costs and expenses of the District incurred in its organization, its operation and in carrying out the provisions of this Agreement, until revenue from taxation or payable to the District by the Association under this Agreement sufficient for the purpose shall come into the hands of the Treasurer of the District.

13. It is mutually agreed that this Agreement may be automatically amended by the requirements of any lawful order issued by the Secretary of the Interior of the United States to the Association, under the Reclamation Act or amendments thereto; that it may, with the approval of the Secretary of the Interior be voluntarily amended by the parties hereto, from time to time, upon proper action taken by the governing bodies of the Association and the District; provided, however, that no voluntary amendment shall be made impairing the validity or security of any bonds of the Association or District, or the source of payment thereof, but that except as so amended automatically or voluntarily it shall remain in full force and effect so long as any part of any debt due or to become due by either party to this Agreement shall be outstanding or unpaid, or until there shall be a merger, lawfully consummated, of the Association and the District.

In Witness Whereof, the Association has caused these presents to be executed by its President and its Secretary duly authorized thereto by its Board of Governors, in accordance with its Articles of Incorporation and its By-laws, and has caused its corporate seal to be affixed hereto in attestation of such signatures, and the District has caused these presents to be executed by its President and its Secretary, and its seal to be affixed hereto in attestation thereof, in accordance with a Resolution of its Board of

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Directors at a regular meeting of said Board duly called and held.

SALT RIVER VALLEY WATER USERS' ASSOCIATION
By (Sgd) LIN B. ORME,
President.

(SEAL)

Attest:

(Sgd) F. C. HENSHAW,
Secretary.

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT
By (Sgd) W. M. SCOTT,
President.

(SEAL)

Attest:

(Sgd) P. L. SIMPSON,
Secretary.

APPROVAL

TO BE MADE A PART OF THE AGREEMENT DATED MARCH 22, 1937, BETWEEN THE SALT RIVER VALLEY WATER USERS' ASSOCIATION AND THE SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT

The foregoing agreement has been examined by me, and subject to the provisions of the Act of Congress approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, and subject to and without waiver, modification or abridgment of any of the terms or provisions of contracts, or any thereof, made in pursuance

of said acts, and subsisting between the United States of America and Salt River Valley Water Users' Association, a corporation and/or the shareholders of said Association, and without waiver, or modification of any rights which the United States may otherwise have, the said agreement is hereby approved.

The approval, however, is not an approval of the recitals of legal inferences based upon the contracts dated July 25, 1904, September 7, 1917, and November 26, 1935, and contracts amending or supplementing the same. And furthermore, the approval is upon the express condition that the District agrees to accept title to the property conveyed subject to any and all provisions of all contracts between the United States and the Association and that the District will faithfully and promptly comply with any order directed to the Association by the United States pursuant to said contracts, and that any remedy available to the United States against the Association by virtue of the contracts mentioned shall be enforceable against the District.

This approval is subject to the further express condition that its terms must be agreed to by the parties by formal act of acceptance.

(Sgd) T. A. WALTERS,
First Assistant Secretary of the Interior.

May 18, 1937.

The foregoing accepted by resolution of Board of Governors of Salt River Valley Water Users' Association and the Board of Directors of Salt River Project Agricultural Improvement and Power District on May 19, 1937.

Appendix G

Amendment of February 28, 1944

This Agreement made and entered into this 28th day of February, 1944, by and between Salt River Valley Water Users' Association, a corporation organized and existing under the laws of the Territory, now State of Arizona, hereinafter called the "Association", and Salt River Project Agricultural Improvement and Power District, a political subdivision and body politic and corporate, organized and existing under the laws of the State of Arizona, hereinafter called the "District."

WITNESSETH: That

WHEREAS the Association and the District entered into that certain Agreement dated March 22, 1937; and

WHEREAS pursuant to the terms and provisions thereof, said District authorized as a unit and as one bond issue its bonds in the aggregate principal amount of $13,000,000, designated "Corporate Bonds, Bond Issue Number One", for the purpose of paying certain indebtedness as specified in said Agreement, as aforesaid; and

WHEREAS of said total authorized issue of said $13,000,000 Bonds, only $9,969,000 principal amount thereof were lawfully issued and delivered from time to time and are now outstanding and unpaid; and

WHEREAS said District proposes to refinance $7,332,000 principal amount of the indebtedness evidenced by a like principal amount of said outstanding $9,969,000 bonds, and to refund such $7,332,000 principal amount of such outstanding bonds evidencing such indebtedness described as follows:

(i) $3,197,000 principal amount, dated October 1, 1937 and maturing serially on January 1 in each of the years 1948 through 1964; and

(ii) $4,135,000 principal amount, dated June 1, 1938 and maturing serially on July 1 in each of the years 1948 through 1964,

by delivering to the holders thereof in exchange and substitution therefor new bonds of said District in a like principal amount, such refunding to be completed with the consent of the holders of such outstanding bonds and on the condition that the bonds of the District offered in exchange therefor will have the same security and source of payment and the same benefits and rights as the outstanding bonds that are to be so refunded; and

WHEREAS pursuant to such undertaking said District by its Board of Directors has adopted a plan of refunding and a resolution authorizing the issue of $7,332,000 principal amount of its Refunding Corporate Bonds, Bond Issue Number One, providing that said bonds shall have all of the rights, remedies, privileges, immunities, and exemptions of the outstanding bonds to be refunded thereby; and

WHEREAS it is the intention of the Association and the District to recognize said Refunding Corporate Bonds, Bond Issue Number One, as hereinabove described, as entitled to the benefit of all the provisions of that certain Agreement entered into between the Association and the District on March 22, 1937, as hereinbefore set out; and

WHEREAS said Agreement provides in paragraph 13 thereof that said Agreement may be voluntarily amended by the parties thereto from time to time upon proper action taken by the governing bodies of the Association and the District, with the approval of the Secretary of the Interior, provided that no such amendment shall be made impairing the validity or security of any bonds of the Associaton or District or the source of payment thereof; and

Appendix G

WHEREAS it is now the intention of the Association and the District to amend said Agreement by adding thereto a new paragraph;

NOW, THEREFORE, in consideration of the premises and of the several covenants, promises, and agreements set forth in said Agreement and hereinabove set forth, the parties have agreed one with the other as follows:

That the Agreement entered into between the Association and the District on March 22, 1937, as hereinabove set forth in the preambles hereto, be amended by adding thereto a new paragraph, as follows:

> "14. It is mutually agreed that all of the terms, provisions, benefits, privileges, covenants, conditions, and agreements of this Agreement shall apply to all bonds issued by the District for the purpose of refinancing or refunding any bonds of said District that have been, or may hereafter be, authorized and issued under any of the provisions hereof, in like manner and with the same force and effect that all of such terms, provisions, benefits, privileges, covenants, conditions, and agreements pertained to the original bonds authorized and issued by said District hereunder."

IN WITNESS WHEREOF the Association has caused these presents to be executed by its President and Secretary duly authorized thereto by its Board of Governors in accordance with its Articles of Incorporation and its By-laws and has caused its corporate seal to be affixed hereto in attestation of such signatures; and the District has caused these presents to be executed by its President and its Secretary and its seal to be affixed hereto in attestation thereof.

in accordance with a resolution of its Board of Directors at a regular meeting of said Board duly called and held.

SALT RIVER VALLEY WATER USERS' ASSOCIATION
By (Sgd) LIN B. ORME,
President.

(Seal)

Attest:

(Sgd) F. C. HENSHAW,
Secretary.

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT
By (Sgd) W. M. SOTT,
President.

(Seal)

Attest:

(Sgd) A. W. McGRATH,
Secretary.

Approved October 3, 1944, subject to the same conditions as incorporated in the Departmental approval of May 18, 1937 of the agreement of March 22, 1937.

(Sgd) MICHAEL W. STRAUS,
Assistant Secretary Department of Interior.

Appendi G

Amendment of September 12, 1949

THIS AMENDMENT OF AGREEMENT, made and entered into this 12th day of September, 1949, by and between SALT RIVER VALLEY WATER USERS' ASSOCIATION, a corporation organized and existing under the laws of the Territory, now the State of Arizona, hereinafter called the "Association", and SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, an Agricultural Improvement District, organized under the laws of the State of Arizona, hereinafter called the "District",

WITNESSETH:

THAT, WHEREAS, the Association and the District entered into an agreement on the 22nd day of March, 1937, which was approved by the Secretary of the Interior on May 18, 1937, subject to certain conditions which were accepted by the Board of Governors of Salt River Valley Water Users' Association and by the Board of Directors of Salt River Project Agricultural Improvement and Power District on May 19, 1937, hereinafter referred to as the "Original Agreement", and

WHEREAS, by the Original Agreement, the Association did, subject to the rights of the United States, transfer and assign all its properties, real and personal, and rights therein, and all water and power rights, franchises and privileges, including all revenues derived from the foregoing, to the District, and the District in consideration thereof has paid as its own obligation all of the principal and interest which has become due and payable upon any and all of the ten items of indebtedness set forth in the preamble of the Original Agreement which had been incurred or assumed by the Association, and did prepare, make, execute and deliver to the Association certain bonds, or proceeds of bonds, as provided in said paragraph, and

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WHEREAS, the proceeds of said bonds of the District have been used primarily for the refunding of debts of the Association incurred in connection with the power system of Salt River Project and for payment of the cost of additions and betterments thereto, and

WHEREAS, the Association has operated all works under the Original Agreement as agent of the District and it is now the desire of the District for reasons of economy and efficiency that the operations of the power system of Salt River Project be separated from the operations of the irrigation and drainage system and that the District directly operate the power system, and

WHEREAS, such separation of the power system from the irrigation and drainage system of Salt River Project can best be effected by the District performing on its own behalf directly all of the functions heretofore delegated to the Association and set forth in Section 1 of the Original Agreement, excepting those which pertain exclusively to the irrigation and drainage of the lands of the Association and the District, and

WHEREAS, this voluntary amendment of the Original Agreement will not impair the validity or security of any bonds of the Association or of the District or the source of payment thereof,

NOW, THEREFORE, in consideration of the premises, as well as of the several covenants, promises and agreements herein set forth, the parties hereto have agreed one with the other as follows:

I—ALLOCATION OF PROPERTY

(a) For the purposes of this Amendment:

(1) The irrigation and drainage system of Salt River Project shall include all of the canals and

laterals used in delivery of water to shareholders of the Association and others, all works for the diversion of water into said canals and laterals, all irrigation and drainage wells and pumping plants, and all other facilities used exclusively in connection with the operation and maintenance of said works and property.

(2) The power system of Salt River Project shall include all works on Salt River and its tributaries above Granite Reef Dam, all property used in the generation, transmission and distribution of electric power and energy, and all other facilities used solely in connection with the operation and maintenance of said works and property.

(b) General property now used jointly in connection with the irrigation and drainage system and the power system shall be allocated to that system for which the most use is made thereof.

II—Assumption of Obligations by District

(a) The District shall assume, take over and agree to perform on its own behalf all the duties, obligations, and covenants delegated to the Association and set forth in Section I of the Original Agreement, and the Association is hereby relieved of all its duties, obligations, and covenants under Section I of the Original Agreements, provided that the Association shall continue to perform the limited functions set forth in Article III hereof as agent for the District.

(b) The District does hereby assume, take over, and agree to conform to the several duties, obligations, and covenants of the Association under all contracts to which the Association is a party, and the Association is hereby relieved of its duties, obligations and covenants under all

contracts to which it is a party, provided that the Association, in the operation and maintenance of the irrigation and drainage system as agent for the District, shall continue to conform with those provisions of said contracts which have to do with the storage, diversion, or delivery of water to or for the benefit of others.

III—Limited Functions of Association

(a) The Association, as agent for the District, shall operate and maintain the irrigation and drainage system of Salt River Project for the use and benefit of the District and its lands and shall obey and comply with all applicable rules and regulations now in force, or hereafter lawfully promulgated by the Secretary of the Interior under the Reclamation Act of 1902 and Acts amendatory thereof.

(b) The Association shall make capital additions to and replacements of irrigation and drainage system property under the conditions set forth in Article IV hereof.

IV—Additions to and Replacements of Property

(a) The District shall be responsible for and bear all costs of capital additions to and replacements of the physical works of the irrigation and drainage system and of the power system. Whenever the District shall determine that it is in the interests of the lands of the District for any capital addition to or replacement of irrigation and drainage system property to be made, the Association shall perform or cause to be performed all work required thereby, unless the District shall have elected to have the work done otherwise.

(b) The District shall provide the Association with funds as needed to make such capital additions and replace-

ments to irrigation and drainage system property and for this purpose the District shall establish and maintain a fund for Replacements of Irrigation and Drainage Plant.

V—Service of Debts

(a) The District shall pay, as and when due, as its own obligation, all installments of principal and interest to the United States under the contracts of June 25, 1904, September 6, 1917, and November 26, 1935, and contracts supplementary thereto, on behalf of the owners of lands within the District, said lands being identical with the lands within the exclusion lines established by order of the Secretary of the Interior limiting and defining the lands within Salt River Project.

(b) The District shall pay, as and when due, as its own obligation, all installments of principal and interest of now outstanding bonds and other obligations of the Association, the District, Roosevelt Agricultural Improvement District No. 1, Agricultural Improvement District No. 2, and Lehi Agricultural Improvement District, and other indebtedness incurred hereafter in connection with any refunding of the aforesaid indebtedness or otherwise for the benefit of the District and its lands.

(c) The provisions of Sections 4 and 5 of the Original Agreement shall not apply with respect to any bonds issued after the effective date of this amendment.

VI—Working Capital of Association

The District shall provide the Association with adequate working capital to enable the Association to operate and maintain the irrigation and drainage systems on a financially sound basis in accordance with accepted standards of safety, reliability and efficiency.

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VII—Storage and Release of Water

(a) It is recognized that the Salt River Project is primarily an irrigation project, and that the development and generation of hydro-electric power thereon is secondary, and the District and the Association shall cooperate to the fullest extent in order to conserve the maximum amount of water, to minimize the operating waste of water, to insure adequate and proper service of water to users thereof, and to protect the dam and other works of Salt River Project.

(b) The District, as promptly as physical operation conditions will permit, shall deliver water to Granite Reef Dam from reservoirs on Salt River and its tributaries at such rates of delivery and at such times as the Association shall request, and the District shall continue to deliver water at such rates of delivery without undue variation until further requested by the Association to change the rate of delivery of water to Granite Reef Dam; provided that the District, in case of an emergency affecting the safety of any dam or appurtenant structure or the public safety, or at times of flood and imminent spillway discharge, may release water from reservoirs and deliver water to Granite Reef Dam at rates exceeding those requested by the Association.

(c) The Association shall use all reasonable means to limit the withdrawal of water from the lowest reservoir on Salt River above its confluence with Verde River to 700,000 acre feet in any year in which all reservoirs on Salt River do not fill and overflow.

VIII—Contracts to Remain in Force

Except as modified, changed or abrogated by the express terms hereof, or by reason of irreconcilable inconsistencies herewith, the Original Agreement, and all contracts and

supplements mentioned in said Original Agreement, shall remain in full force and effect.

IX—Effective and Operative Dates

This amendment shall be effective when authorized by proper action taken by the governing bodies of the Association and the District and executed by properly authorized officers of the Association and the District and when approved by the Secretary of the Interior, and shall become operative as of the first day of the next succeeding month.

In Witness Whereof, the Association has caused these presents to be executed by its President and its Secretary, duly authorized thereto by its Board of Governors, in accordance with its Articles of Incorporation and its By-laws, and has caused its corporate seal to be affixed hereto in attestation of such signatures, and the District has caused these presents to be executed by its President and its Secretary, and its seal to be affixed hereto in attestation thereof, in accordance with a Resolution of its Board of Directors at a regular meeting of said Board duly called and held.

Salt River Valley Water Users' Association

(seal) By (Sgd) R. D. Searles,
President.

Attest:
(Sgd) J. F. Griswold,
Secretary.

Salt River Project Agricultural Improvement and Power District

(seal) By (Sgd) R. D. Searles,
President.

Attest:
(Sgd) A. L. Monette,
Secretary.

Appendix G

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
Washington 25, D. C.

APPROVAL TO BE MADE OF THE AMENDMENT DATED SEPTEMBER 12, 1949, TO CONTRACT DATED MARCH 22, 1937, BETWEEN SALT RIVER VALLEY WATER USERS' ASSOCIATION AND SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT.

The foregoing contract amendment has been examined by me, and subject to the provisions of the Act of Congress approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, and subject to and without waiver, modification or abridgment of any of the terms or provisions of contracts, or any thereof, made in pursuance of said acts and subsisting between the United States of America and Salt River Valley Water Users' Association, a corporation, and or the shareholders of said Association, and without waiver, or modification of any rights which the United States may otherwise have, the said contract amendment is hereby approved.

Notwithstanding any of the provisions of the said amendment to contract dated September 12, 1949, this approval is subject to any and all provisions of all contracts between the United States and said Association in existence as of the date of this approval, and that Salt River Project Agricultural Improvement and Power District shall faithfully and promptly comply with any order directed to the Association by the United States pursuant to said contracts, and that any remedy available to the United States against the Association by virtue of the contracts mentioned shall be enforceable against said District.

This approval is subject to the further express condition that its terms must be agreed to by the parties by formal act of acceptance.

OCTOBER 4, 1949 — (Sgd) OSCAR L. CHAPMAN,
Date — Acting Secretary of the Interior.

Supreme Court, U.S.
FILED
7 1963
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 803

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,

Appellant,

vs.

THE CITY OF MESA, ARIZONA

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

MOTION TO DISMISS OR AFFIRM

J. La Mar Shelley,
City Attorney of the City of Mesa,
Mesa, Arizona.

Charles S. Rhyne,
Brice W. Rhyne,
Alfred J. Tighe, Jr.,
Rhyne & Rhyne,
400 Hill Building,
Washington 6, D.C.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 803

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,

Appellant,

vs.

THE CITY OF MESA, ARIZONA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

MOTION TO DISMISS OR AFFIRM

Appellee, City of Mesa, moves to dismiss or affirm the appeal herein pursuant to Rule 16 of the Revised Rules of this Court, upon the ground that no substantial Federal question is presented.

Question Presented

Is a political subdivision of a State deprived of equal protection of the law under the Constitution of the United States when the State Supreme Court interprets State law as providing that another subdivision of the same State has the authority to furnish electric energy to consumers in a certain area?

Statement of the Case

This appeal is from a unanimous opinion of the Supreme Court of Arizona, En Banc, in a declaratory judgment action brought pursuant to Arizona Law, Arizona Revised Statutes Annotated, 1956, Title 12, Ch. 10 (hereinafter cited A.R.S.) to determine which political subdivision of the state has the right to serve electrical energy to consumers in areas within and adjacent to the City of Mesa. The action was brought by the City of Mesa against the Salt River Project Agricultural Improvement and Power District (hereinafter called the District).

The City of Mesa is a political subdivision of the State of Arizona. The District was organized and exists pursuant to Arizona Law, A.R.S., Title 45, Ch. 4, for the purpose of reclaiming lands susceptible of irrigation. The District is a political subdivision of the State of Arizona, Arizona Constitution, Art. 13, Sec. 7, and a municipal corporation to the extent of the powers granted to it.[1] (A.R.S. §45-902).

The predecessor of the District was the Salt River Valley Water Users' Association, (hereinafter referred to as the Association,) which was incorporated in 1903 under the General Corporation Laws of the Territory of Arizona for the purpose of furnishing water, irrigation, power and drainage to lands of members. It was authorized to contract with the United States for the construction and operation of dams, power plants, transmission lines, canals, and other facilities incident to the storage, production, distribution and operation of irrigation, water, power and drainage works for the benefit of the lands described in its articles

[1] See also *Local 266, Etc.* v. *Salt River Project Agr. Imp. and P. Dist.*, 78 Ariz. 30, 275 P. 2d 393 (1954)—while irrigation districts are subdivisions of the state in some senses, their function is purely business and economic, rather than political or governmental.

of incorporation and within the boundaries of the Association. (R. 7.) [2]

The Association entered into a contract with the United States in 1904 (P. 39a) whereby the United States undertook construction of irrigation works along the Salt River conditioned upon appropriate payments by the Association (P. 42a). A 1917 contract (P. 47a) provided for the transfer of the care, operation and maintenance of the irrigation works to the Association and the payments by the Association to the United States for the construction of the project. (P. 50a).

In 1928 the Association amended its Articles of Incorporation to authorize, and, by agreement with its shareholders, began to provide electric service to lands and people within a part of the Salt River Valley. Since 1928 the Association, or the District, has also constructed an additional hydroelectric plant, additional steam generating plants, transmission lines and additions to the distribution system at a cost in excess of Forty-five Million Dollars ($45,000,000.00) (R. 81, 82). Funds for this program were provided by the issuance of bonds.

In 1937 the Association transferred and assigned all its properties and rights to the District (P. 58a). Up until this transfer, property and bonds of the Association were subject to local, state and Federal taxes. The purpose of this transfer was to secure "exemption of the property and bonds of the Association from local, state and Federal taxes". (P. 62a). By transferring the property and bonds to the District, a municipal corporation, the exemption occurred with the adoption of a constitutional amendment. Ariz. Const., Art. 13 § 7. The Association continued, how-

[2] References to pages of the Abstract of Record filed with the Supreme Court of Arizona and certified to this Court are indicated by "(R.)". References to the Jurisdictional Statement are indicated by "(P.)".

ever, to operate and maintain all of the works and facilities until 1949 at which time the District took over the maintenance and operation of the electric power system. (P. 2a). The Association continues to operate all facilities other than those for the production, sale and distribution of electrical energy.

From time to time since 1917 when the City of Mesa began furnishing utilities to its residents, it entered into contracts to purchase wholesale power from the Association and in connection with such agreements entered into certain territorial agreements. However, since 1949 there has been no agreement or contract, entered into or in force, between the City of Mesa, the Association or the District for purposes of reserving to either the territory of electrical service. *City of Mesa* v. *Salt River Project, Agr. Imp. & P. Dist.*, 92 Ariz. 91 373 P. 2d 722, 726 (1962) (P. 3a, 12).

The tremendous growth of the area subsequent to World War II necessitated the expansion by means of annexation of the incorporated limits of the City and expansion of the facilities and services of the District. As a result, the District is now serving customers within the City, and using City streets and other public ways for the purpose.

Under Arizona law any person desiring to subdivide any area within 3 miles of an incorporated city must secure approval by the City of his proposed plat (A.R.S. § 9-474). This statutory requirement and the maps in the record (R. 101-102) make it crystal clear that the disputed service area has not been served by the District for any great length of time. In fact, most of the service connections of the District within the city limits of Mesa have been made within the last 3 to 7 years, i.e. from 1600 connections in 1956 to over 6000 now. The majority of the disputed area was farm land until annexed by the City of Mesa and much of it still is uninhabited.

The City owned utility out of its earnings pays more than two thirds (2/3) of the City's budget for police, fire and all other municipal expenses. (R. 182). The District, on the other hand, pays nothing to the City as its share of such municipal expenses. Yet, the District uses city streets and all the services furnished by the City free.

While in a previous similar dispute,[3] the District sold its facilities within a disputed area to the City, the parti are now unable to arrive at a settlement and thus the declaratory judgment action was brought. The City has always objected to the District extending its facilities within the City's corporate limits. (R. 11-13, 49). And the City is now and always has been ready and willing to pay to the District the full value of these District facilities (Brief of Appellant in Ariz. Sup. Ct., p. 75).

The Supreme Court of Arizona, in a comprehensive opinion, decided that:

> (1) The District can be required to terminate its electrical service within the disputed area upon the payment of just compensation for its property rights;
>
> (2) A state statute prohibits the City of Mesa from competing with the District in the disputed area and the City of Mesa may not serve the disputed area unless it first acquires the District's facilities; and
>
> (3) The City of Mesa can acquire by eminent domain the facilities of the District in the area. (P. 1a-18a).

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[3] Randall Heights Area, Brief of Appellant In The Supreme Court Of the State of Arizona, p. 6.

ARGUMENT

No Substantial Federal Question Is Raised By This Appeal

1. *The Fourteenth Amendment Is Not Violated By Provisions Of The Constitution Or Law Of Arizona Relative To Powers Of Political Subdivisions.*

In the absence of Constitutional restrictions (*Williams* v. *Eggleston*, 170 U.S. 304; *Mount Pleasant* v. *Beckwith*, 100 U.S. 514) the legislature has absolute control over the number, nature, duration and extent of powers conferred upon political subdivisions and the territory over which they shall be exercised. *Hunter* v. *Pittsburgh*, 207 U.S. 161. The state may qualify, enlarge, abridge or entirely withdraw at its pleasure the powers of a political subdivision. *Meriwether* v. *Garrett*, 102 U.S. 472; *Laramie County* v. *Albany County*, 92 U.S. 307. This Court has stated "Neither their [municipal corporations] charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution", *Hunter* v. *Pittsburgh*, 207 U.S. 161, 178. *Hunter* v. *Pittsburgh* also holds that the state is supreme as to the powers of its political subdivisions and its legislative body conforming its action to the State Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. A long line of decisions of this Court reaffirm this principle cf. *Gomillion* v. *Lightfoot*, 364 U.S. 339, 343.

The City is a municipality organized under the general laws of the State of Arizona and the constitutional provisions relating to it are found in Article 13, Arizona Constitution.

The District is an agricultural improvement district organized pursuant to the provisions of what is now Chapter 4, Title 45, Ariz. Rev. Stats. and is a political subdivision of the State of Arizona under Section 7, Article 13, Arizona Constitution. The predecessor in interest to the District, the Association, was incorporated in 1903 under the General Corporation Laws of the Territory of Arizona.

The District has consistently referred to itself and its predecessor as a subdivision of the State of Arizona (P. 58a, 74a, 78a).

In the words of the Supreme Court of Arizona, the District's exact status escapes a simple definition, however, "It is denominated a political subdivision of the state and entitled to all the immunities and benefits granted to municipalities by the Constitution or statutes, Constitution, Art. 13 § 7 [Amendment of 1940]. Yet as a political subdivision its powers are obviously limited to the purposes justifying its political existence. The privileges and immunities granted extend only so far as they have a legitimate relationship to the legal objectives for which the District is organized."[4] (P. 4a).

The Constitution and Statutes of Arizona relevant to the status of the City and of the District and their respective authority to provide electric utility service to the consumers have been interpreted by the Supreme Court of Arizona, En Banc. In a unanimous opinion this Court held that:

(1) The District may not be required by the City to terminate its operations in the annexed area without just compensation;

(2) The right of the City and District to compete in

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[4] See also *Taylor* v. *Roosevelt Irr. Dist.* 72 Ariz. 160, 232 P. 2d 107 (1951) and *Local 266, Etc.* v. *Salt River Project Agr. Imp. and P. Dist.*, supra Note 1.

the disputed localities has been expressly denied by the legislature in its enactment of A.R.S. § 9-516 subd. A; and

(3) The City may acquire the District's facilities by eminent domain.

In so holding the Court stated that the District is a municipal corporation of a peculiar type, its primary function is to provide water for irrigation, and this has not been changed by Art. 13, Sec. 7 of the Constitution; and that in conducting its ordinary business the District is not exercising governmental or political prerogatives as it is not operated for the direct benefit of the general public but, only those landowners who are inhabitants of the District itself.[5]

This construction of the Arizona Constitution and statutes is binding upon this Court. *Jefferson Branch Bank* v. *Skelly*, 1 Black (U. S.) 436, 443; *Morehead* v. *New York*, 298 U. S. 587, 609; *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64.

2. *The District Is Not Denied Equal Protection Because The Law Of Arizona Makes A Reasonable Classification Among Political Subdivisions.*

The Equal Protection Clause was not designed to insulate state instrumentalities from state action, and as political subdivisions they do not have privileges or immunities which they may invoke contrary to the will of their creator. "A municipal corporation, created by a state for better ordering of government, has no privileges or immunities

[5] The Court had held in *Taylor* v. *Roosevelt Irr. Dist.*, supra, Note 4, that adoption of the Constitutional amendment in no sense altered the inherent characteristics of the District and that it is essentially a business corporation with attributes of sovereignty which are only incidental, conferred for the purposes of better enabling it to function and accomplish the business and economic purposes for which it was organized.

under the Federal constitution which it may invoke in opposition to the will of its creator." *Williams* v. *Baltimore*, 289 U. S. 36, 40; see also *Hunter* v. *Pittsburgh*, 207 U. S. 161. As this Court long ago held in *Laramie County* v. *Albany County*, 92 U. S. 307, 311, political subdivisions of a state cannot sustain their privileges or even their existence upon the basis of any contract with the state. Nor do they have any contract rights with the state solely by reason of their relationship to it. *Gomillion* v. *Lightfoot*, 364 U. S. 339, 343. "—[T]he Equal Protection Clause relates to equality between persons as such, rather than between areas." *McGowan* v. *Maryland*, 366 U. S. 420, 427.

That there is a distinction between the District and the City is amply demonstrated by the decision of the Arizona Supreme Court.[6] In addition, Mesa has a right given by the Arizona Constitution to engage in the electric utility business while the District has not.[7] The City can grant a franchise for a public utility to serve electrical energy. The District cannot. Hence, Mesa has a constitutional right to engage in this business; the District has not.

It has long been settled that a classification, even though discriminatory, is not arbitrary or violative of the Equal Protection Clause if any state of facts reasonably can be conceived that would sustain it. *Allied Stores* v. *Bowers*, 358 U. S. 522, 528.

The Arizona Supreme Court has considered the classification of the powers of the City and of the District to be valid. 92 Ariz. 91, 373 P. 2d 722 (1962). The record on this

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[6] See Jurisdictional Statement 13a; see also *Taylor* v. *Roosevelt Irr. Dist.*, supra, Note 4, and *Local 266, Etc.* v. *Salt River Project Agr. Imp. and P. Dist.*, supra, Note 1.

[7] Art. 13, Sec. 5 of the Arizona Constitution reads: "Every municipal corporation within this State shall have the right to engage in any business or enterprise which may be engaged in by a person, firm or corporation by virtue of a franchise from said municipal corporation."

case wholly fails to support any claim that the classification so fixed infringes the Equal Protection Clause.

3. *Questions Presented For The First Time In This Court Are Raised Too Late*

In stating the Question it says it presents in its Jurisdictional Statement, Appellant for the first time in this litigation describes itself as a "federal reclamation project" in challenging the right of the City to take its electrical service facilities which are located within the city's corporate limits. This "federal reclamation project" description was not mentioned by Appellant in any Court below, was not listed in the Notice of Appeal and is obviously an afterthought which is totally without merit.

No federal money has ever been spent on the District's electrical power facilities to serve private homes and businesses within the corporate limits of the City of Mesa, which facilities are the disputed facilities herein. (R. 81, 82, 84, 109). No federal action or interest has ever been directed at these facilities. The federal government has had absolutely nothing to do with these facilities. The reclamation part of the project and the sale and delivery of electrical energy have been operated as separate projects since 1949 (P. 2a, 58a). The Appellant's attempt at this late stage of this case to dream up a "Federal angle" and interest is so novel as to be a sham. So palpably a "last gasp" at something new never even mentioned in the courts below is so lacking in legal value as to be totally without substance. Yet most of the Jurisdictional Statement is devoted to alleged errors based on Appellant's alleged federal reclamation status, a claim which this Court in a long line of decisions has repeatedly held it will not consider because it is raised for the first time in this Court.

This Court long ago declared that it is too late when

new matters are raised for the first time in this Court saying:

"It does not appear, however, from the record that this constitutional question was presented in or passed upon by the Supreme Court of the State; and as it was sought to raise this question for the first time by assignments of error in this Court, it is necessarily excluded from our consideration." *White River Lumber Co.* v. *Arkansas*, 279 U.S. 692, 700; see also *Edelman* v. *California*, 344 U.S. 357; *Hiawassee River P. Co.* v. *Carolina-Tennessee P. Co.*, 252 U.S. 341.

It is interesting to note that Paragraph V of the District's Amended Counterclaim, (R. 84), alleged without qualification that the facilities here in question are owned outright by the District and no mention is made of any interest on the part of the United States.[8] The facilities in question are a part of those constructed by the District with its own funds or the funds of its predecessor and no Federal Government funds of any nature are involved therein.

Under the Reclamation Law, the United States reserved the right to take over and manage any reclamation project if it ceases to successfully function as a reclamation project. This eventuality is not involved here and since the original contracts of the United States and the Association (P. 39a) the entirely different functions of the operation of the reclamation project for the purpose of furnishing irrigation water to arid lands and the sale of surplus electricity as an enterprise of the District for the sole purpose of reducing the cost of water and power to its shareholders have been separated. It is interesting that in its complaint

[8] The precise question of ownership was also asked and similarly answered by the District in answer to Interrogatories of the City. R. 109; see also Findings of Fact VII of the Arizona Superior Court, R. 23a.

the City alleged that the statutes pertaining to condemnation did not provide Mesa with the right to condemn the facilities of the District. (P. 34). In its answer, the District denied that this was so, admitting directly that Mesa did have the right to condemn its facilities. (P. 53).

Nothing in the cases of *Ivanhoe Irrigation District* v. *McCracken*,[9] *United States* v. *San Francisco*,[10] *Federal Power Commission* v. *Idaho Power Co.*,[11] *New York Trust Co.* v. *Farmers Irrigation District*,[12] *Nebraska* v. *Wyoming*,[13] *Oklahoma* v. *Guy F. Atkinson Co.*,[14] *United States* v. *Rio Grande Dam and Irrigation Co.*,[15] *Arizona* v. *California*,[16] and *United States* v. *Carmack*,[17] cited by Appellant warrants a conclusion that the United States has or could possibly claim an interest in the District's property here in question.

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[9] 357 U.S. 275—Federal law is applied in determining validity of contracts between the United States, State of California and others under § 8 of Reclamation Act of 1902.

[10] 310 U.S. 16—Injunction to prevent San Francisco from selling water through a private utility.

[11] 344 U.S. 17—F.P.C. had authority to attach a condition to a grant.

[12] 280 Fed. 785 (8th Cir. 1922)—Secretary of Interior lacked authority to voluntarily take over Irrigation District until indebtedness was paid.

[13] 325 U.S. 589—Priority of water rights in the North Platte River.

[14] 313 U.S. 508—U.S. has superior power of eminent domain, but does not deal with a state condemning a power distribution system.

[15] 174 U.S. 690—Congress recognized and assented to appropriation of water in contravention of common law rules but not to destroy navigability of rivers.

[16] 298 U.S. 558—Appropriation rights on the Colorado River, no federal reclamation project involved.

[17] 329 U.S. 230—U.S. had power to condemn lands owned by the State for a Post Office.

Conclusion

For the reasons given above, the appeal should be dismissed or the decision of the Arizona Supreme Court should be affirmed as no substantial federal question is presented herein.

Respectfully submitted,

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(6210-9)

Office-Supreme Court, U.S.
FILED
MAR 2 7 1963
JOHN F. DAVIS, CLERK

No. 803

IN THE

Supreme Court of the United States

October Term, 1962

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, an agricultural improvement district,

Appellant,

v.

THE CITY OF MESA, a municipal corporation,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

The three contentions advanced by the City of Mesa * in its Motion to Dismiss or Affirm in support of the argument that no substantial federal question is raised by this appeal will be considered in sequence.

* As in the Jurisdictional Statement, the City of Mesa will be referred to as "the City" and the Salt River Project Agricultural Improvement and Power District will be referred to as "the District." References to pages of appellee's Motion to Dismiss or Affirm will be designated by "(Motion —)."

1. Arizona's Constitution and Statutes, Making the District a Political Subdivision of the State, Do Not Give the State Absolute Control Over the District as a Federal Instrumentality so as to Deprive It of the Right to Protection under the Federal Constitution.

The City argues that a state has "absolute control" over its political subdivisions and therefore "may do as it will" regarding their powers and property, "unrestrained by any provision of the Constitution of the United States" (Motion 6). However, the cases cited by the City for this thesis themselves show that it has important exceptions which render it inapplicable to the case at bar.

Thus, the leading case of *Hunter* v. *Pittsburgh*, 207 U. S. 161 (1907), explains that the basis of the state's dominion over municipal corporations is that they "are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them." 207 U. S. at 178. Hence, it is as *state* agencies exercising *state governmental* powers that purely *local* municipalities are subject to the "absolute control" of the state unrestrained by federal constitutional limitations.

However, the District was not created nor does it function merely as a state agency. Rather, the state authorized the organization of the District by owners of lands within a United States reclamation project in order to secure water and electrical power for such lands, to sell surplus water and power to reduce the cost of irrigating these lands and to construct, maintain and finance the necessary project works to achieve these ends. ARS § 45-903. It was to enable the District to accomplish these federal purposes—identical with those of Congress in enacting the Reclamation Act—that the state clothed the District with certain powers and privileges "granted generally to municipal corporations by the Constitution and statutes of the State." ARS § 45-902.

Furthermore, *Hunter* v. *Pittsburgh* held that the state, "at its pleasure", may take "without compensation" such property as is acquired and used by a municipal corporation for "the purpose of executing . . . properly and efficiently" "such of the governmental powers of the state as may be intrusted to them." 207 U. S. at 178. The Court was careful, however, to limit this "absolute power of the state over the property of municipal corporations" to "property held and used for [state] governmental purposes." 207 U. S. at 179. In this connection, the Court questioned, without deciding, "whether property of a municipal corporation owned in its private and proprietary capacity may be taken from it against its will and without compensation." 207 U. S. at 179.*

In the instant case, the District did not acquire and does not hold or operate its electrical power facilities for the purpose of exercising, as a state agency, any governmental functions of the State of Arizona. On the contrary, the very statutes of Arizona authorizing the District's organization expressly provide that title to property acquired by the District is to be held "*in trust for, and is dedicated and set apart to*, the uses and purposes" of the statute creating the District. ARS § 45-937 A (italics added). Those purposes, we repeat, were the *federal* purposes of the Salt River Project—a federal reclamation project. ARS § 45-903. The State of Arizona, having thus consented that the property of the District be held in trust for and dedicated and set apart to federal uses and purposes, may not authorize the City (through judicial construction of the

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* The Supreme Court of Arizona did not regard the District as a purely municipal corporation under the absolute control of the State of Arizona. Instead, it held that the District "is essentially a business corporation with attributes of sovereignty which are only incidental, conferred for the purposes of better enabling it to function and accomplish the business and economic purposes for which it was organized." That is why the court held that the City, in taking the power facilities of the District, would be required to pay just compensation therefor (Jurisdictional Statement, p. 13a).

state constitution and statutes) to take this property, so trusteed and dedicated, from the District without the consent either of the District or the United States.

In *United States* v. *Bekins*, 304 U. S. 27 (1938), the question before the Court was whether the exercise of the federal bankruptcy power, in dealing with a composition of debts of an irrigation district upon its voluntary petition, with the state's consent, was an unconstitutional federal interference with the state's sovereign power over its political subdivisions. The Court stated:

> "It is of the essence of sovereignty to be able to make contracts and give consents bearing upon the exertion of governmental power. This is constantly illustrated in treaties and conventions in the international field by which governments yield their freedom of action in particular matters in order to gain the benefits which accrue from international accord. . . . The reservation to the States by the Tenth Amendment protected, and did not destroy, their right to make contracts and give consents where that action would not contravene the provisions of the Federal Constitution." 304 U. S. at 52.

The State of Arizona has consented, by appropriate legislation, to the operation of its agricultural improvement districts as instrumentalities of the United States in carrying out the purposes of federal reclamation projects within the state. The Arizona statutes relating to the formation and management of such districts are clearly designed to facilitate federal maintenance and operation of reclamation projects through the agency of the districts. See Jurisdictional Statement, pp. 13-15.

ARS § 45-936 expressly authorizes the board of directors of the District to enter into and perform contracts with the United States:

> "A. . . .
>
> "3. For providing or furnishing power or any means of communication for the use of the owners or occupants of land within the district.

> "4. To reduce the cost of irrigation, drainage and power to the owners of the lands in the district by the sale of surplus water or power produced, owned or controlled by the district, and the construction, maintenance, extension, replacement, financing and refinancing of the works useful for such purpose."

Since the District is utilizing its power facilities and works as an integral component of the power system of the Salt River Project with the consent of the State of Arizona, the compulsory transfer of the District's property to the City would not be an exercise of state power "wholly within the domain of state interest." *Gomillion* v. *Lightfoot*, 364 U. S. 339, 347 (1960). Therefore, the power of the state to regulate and control the property of the District is subject to and limited by the federal public use to which that property has been trusteed and dedicated.

This entrustment and dedication of the District's property to the uses of a federal reclamation project prevent its taking by the City in condemnation, even if, as the Supreme Court of Arizona decided, the District's electrical transmission facilities are held by it in its private or proprietary capacity (Jurisdictional Statement, pp. 9a, 13a). For even then the property, although privately held (as it was originally by the Salt River Valley Water Users Association, a private corporation), is nevertheless trusteed and dedicated to a federal public use and purpose, which neither the state nor the City may interfere with or frustrate.

The Court's decision in *Gomillion* v. *Lightfoot*, *supra*, places in proper perspective the constitutional limitations upon the state's control over its political subdivisions. There, Justice Frankfurter, speaking for a unanimous court, after reviewing the line of cases dealing with the power of a state over its municipalities, stated:

> "This line of authority conclusively shows that the Court has never acknowledged that the States

> have power to do as they will with municipal corporations regardless of consequences. Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution." 364 U. S. at 344-45.

Justice Frankfurter's ultimate conclusion in *Gomillion*, has, we believe, a special significance and application here:

> "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." 364 U. S. at 347.

2. Since the District, in its Electrical Power Operations, Is a Federal Instrumentality, It May Invoke the Equal Protection Clause Against the Arbitrary and Erroneous Distinction Drawn by the Supreme Court of Arizona between the City and the District.

Assuming the correctness of the general proposition stated by the City that "the Equal Protection Clause was not designed to insulate state instrumentalities from state action" (Motion 8), that doctrine is not applicable here.

As Justice Cardozo indicated in *Williams* v. *Baltimore*, 289 U. S. 36, 40 (1933), the reason why the benefit of the Equal Protection Clause is usually not available to municipalities is that

> "a municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator."

Since, as we have previously stated, the District in its electrical transmission operations is not a state agency, but

rather an instrumentality of the United States engaged in the maintenance and operation of the power system of a federal reclamation project, it is hardly debatable that the District, as a federal agency, is entitled at the very least to equal treatment with a state instrumentality under state law. It is because the City, as a purely state agency, has been given preferential treatment over the District, a federal agency, that the protection of the Equal Protection Clause of the Fourteenth Amendment was properly invoked by the District and improperly denied to the District in the court below.

3. The Question Presented Is Not Raised for the First Time in This Court.

The City asserts that the questions presented in the Jurisdictional Statement are raised for the first time in this Court (Motion 10-12). However, elsewhere the City is contending that these questions were not only raised in, but decided by, the Arizona Supreme Court and are *res judicata*.

On December 21, 1962, the City commenced suit in the Superior Court, Maricopa County, Arizona, No. 145304, to condemn the District's electrical power transmission facilities involved in the case at bar. The District moved to dismiss the complaint upon the grounds, among others, that: (1) the interests of the United States in the maintenance and operation of the facilities as part of the Salt River Project power system are such as to make the United States an indispensable party to the condemnation action; and (2) the taking of the District's property in condemnation would deny it the equal protection of the laws guaranteed by the Fourteenth Amendment.

The City's Answering Memorandum in opposition to the motion asserts (p. 1) that the "grounds raised by the District in its motion to dismiss . . . have been decided ad-

versely to the District in the case of *City of Mesa, Appellant* v. *Salt River Project Agricultural Improvement and Power District, Appellee,* 92 Ariz. 91, 373 P. 2d 722, and therefore, such matters are res judicata."

The City's Memorandum continues (p. 4):

> "Thus the right of Mesa to condemn the precise areas and precise facilities described in the complaint on file herein was a matter in issue in this Court in that former case.
>
> "While the question of the United States being an indispensable party was not therein argued, the precise issue here in question was decided, that is, that Mesa may condemn these facilities, hence, is res judicata, and District may not now raise that issue. Further, the precise issue as to the *ownership of the facilities that Mesa seeks* to condemn, was litigated and decided in that action, and all contracts attached to District's affidavit were therein brought to the attention of the Court and discussed." (City's italics)

The contracts referred to are those printed as Appendices E, F and G to the Jurisdictional Statement. After analysis of these contract provisions, the City concludes (p. 9):

> "Thus, it is plain that not only has the question of ownership of the facilities been decided to the effect that they are owned by the District, but *also decided in the prior case was the issue as to the interest of the United States in these particular facilities.*" (City's italics)

The City's Memorandum also states, even more categorically, that the Equal Protection question was raised and determined by the Supreme Court of Arizona in the instant action. As to this, the City states (p. 10):

> "That a taking of the District's property in this action is a taking in contravention of the Fourteenth Amendment to the Constitution of the United States,

and Section 4, Article 2 of the Constitution of the State of Arizona was raised in the case of *City of Mesa* v. *Salt River Project*, supra. The first reference to this question is found in the District's counterclaim on page 84 of the Abstract of Record. This question was argued vehemently to the Court in District's petition for rehearing, and brief in support thereof in the above case, wherein as a ground for its rehearing the District stated as follows:

> " 'The Court's decision, contrary to the plain meaning of the provision, denies to the District equal protection of the law guaranteed by the 14th Amendment of the Federal Constitution.' Petition for Rehearing, page 2.

"This argument is discussed at length in the petition for rehearing and brief in support thereof beginning on page 14. This contention of the District was overruled specifically by the Supreme Court, when on September 20, 1962, it made the following order:

> " 'ORDER: Motion for Oral Argument on Rehearing Motion—DENIED.
>
> " 'FURTHER ORDERED: Motion for Rehearing—DENIED.' "

In short, the City's contention before this Court that the questions presented on this appeal are raised for the first time in this Court (Motion 10-12), is wholly inconsistent with and contradictory to the position even now being taken by the City before the Arizona Superior Court —that these very questions were presented to and adjudicated by the Supreme Court of Arizona in the case at bar.

Conclusion

The Motion to Dismiss or Affirm should be denied and probable jurisdiction noted.

Respectfully submitted,

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Dated: March 28, 1963.

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